No. 06-1322
Title: Federal Express Corporation, Petitioner
v.
Paul Holowecki, et al.
Docketed: April 3, 2007
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (04-3376)
Decision Date: March 8, 2006
Rehearing Denied: October 31, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jan 19 2007	Application (06A726) to extend the time to file a petition for a writ of certiorari from January 29, 2007 to March 30, 2007, submitted to Justice Ginsburg.
Jan 23 2007	Application (06A726) granted by Justice Ginsburg extending the time to file until March 30, 2007.
Mar 30 2007	Petition for a writ of certiorari filed. (Response due May 3, 2007)
May 3 2007	Brief of respondents Paul Holowecki, et al. in opposition filed.
May 3 2007	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
May 15 2007	DISTRIBUTED for Conference of May 31, 2007.
Jun 4 2007	Petition GRANTED.
Jul 11 2007	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 9, 2007.
Aug 9 2007	Joint appendix filed.
Aug 9 2007	Brief of petitioner Federal Express Corporation filed.
Aug 9 2007	Brief amicus curiae of Chamber of Commerce of the United States filed.
Aug 9 2007	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
Aug 30 2007	SET FOR ARGUMENT Tuesday, November 6, 2007.
Sep 11 2007	The time to file respondents' brief on the merits is extended to and including September 24, 2007.
Sep 17 2007	CIRCULATED.
Sep 21 2007	Record received from U.S.D.C. for the Southern District of New York. (1 box)
Sep 24 2007	Brief amici curiae of AARP, et al. filed.
Sep 24 2007	Brief amicus curiae of United States filed.
Sep 24 2007	Brief of respondents Paul Holowecki, et al. filed. (Distributed)
Sep 25 2007	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Sep 25 2007	Record received from U.S.C.A. for 2nd Circuit. (1 envelope)
Oct 9 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 29 2007	Reply of petitioner Federal Express Corporation filed. (Distributed)
Nov 6 2007	Argued. For petitioner: Connie L. Lensing, Memphis, Tenn. For respondent: David L. Rose, Washington, D.C.; and Toby J. Heytens, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED
061322 MAR 30 2007
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No. _____

In the
Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

PAUL HOLOWECKI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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March 30, 2007

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QUESTION PRESENTED

Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue this Court has examined but not yet decided, that an "intake questionnaire" submitted to the Equal Employment Opportunity Commission ("EEOC") may suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The Petitioner here and appellee below is Federal Express Corporation (d/b/a FedEx Express).

The Respondents here and appellants below are Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Thompics. By virtue of the allegations of their Complaint in the District Court, the Respondents seek to represent a putative class of persons similarly situated, but no motion for class certification has yet been filed and no class has been certified.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The parent company of Petitioner Federal Express Corporation (d/b/a/ FedEx Express) is FedEx Corporation, whose stock is publicly traded on the New York Stock Exchange under the symbol FDX.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 440 F.3d 558, and is reprinted in the Appendix to the Petition ("Pet. App.") at 3a–23a. The District Court's opinion is not reported, but is available at 2002 WL 31260266, and 2002 U.S. Dist. LEXIS 19100, and is reprinted at Pet. App. 31a–42a.

JURISDICTION

The Court of Appeals for the Second Circuit issued its opinion on March 8, 2006. The Court of Appeals entered its order denying rehearing and rehearing en banc on October 31, 2006. On January 23, 2007, Justice Ginsburg extended the time for filing a petition for a writ of certiorari until March 30, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* The pertinent provisions are reproduced at Pet. App. 62a–67a.

STATEMENT OF THE CASE

District court jurisdiction. The court of first instance, the United States District Court for the Southern District of New York, had jurisdiction of this matter pursuant to 28 U.S.C. § 1331.

Factual Background. In December 2001, Respondent Patricia Kennedy submitted to the EEOC an intake questionnaire, EEOC Form 283, in which she provided

information about allegations of age discrimination by her employer, Federal Express Corporation ("FedEx"). Pet. App. 43a–52a. The intake questionnaire did not include any indication that it constituted a charge of discrimination for purposes of the ADEA. Indeed, Form 283 states that it is a means for determining whether the EEOC has jurisdiction over "potential charges" and for providing "pre-charge filing counseling." *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir. 2004), *cert. denied*, 543 U.S. 1020, 125 S. Ct. 656 (2004). Nor did the EEOC treat Kennedy's intake questionnaire as a charge: the EEOC did not assign the intake questionnaire a charge number, did not notify FedEx of the intake questionnaire, and did not commence an investigation based on the intake questionnaire—acts the EEOC is required to do if it receives a charge. *See* 29 U.S.C. § 626(d) ("Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.").

Then, in April 2002, Respondent Kennedy and thirteen other current and former FedEx employees initiated this lawsuit in the Southern District of New York, alleging that FedEx had implemented policies in 1994 and 1995 that violated the ADEA. R.1.[1] The Complaint did not allege that Kennedy or any of the thirteen other plaintiffs had filed a charge of discrimination; nor did it allege that the December 2001 intake questionnaire completed by Kennedy constituted a charge. *See* R.1.

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[1] Citations to record evidence refer to the docket number in the district court record.

Respondent Kennedy finally filed a formal charge of discrimination with the EEOC on May 30, 2002—one month after she had filed this lawsuit—using the EEOC's form for charges, Form 5. R.8, Ex. 7.[2] This charge was untimely because Kennedy had filed suit *before* filing the charge, despite the ADEA's requirement that an employee wait to file suit until sixty days *after* filing an EEOC charge to permit the EEOC time to investigate and to seek conciliation between the employee and employer. *See* 29 U.S.C. § 626(d) ("No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC].").

Lower Court Proceedings. FedEx moved to dismiss the complaint on the ground that none of the fourteen named plaintiffs had filed a timely or valid charge of discrimination with the EEOC, as required by the ADEA. R.4; 29 U.S.C. § 626(d). Because the charge filed by Respondent Kennedy in May 2002 was clearly untimely, the plaintiffs did not assert that charge as the basis for their suit. Instead, they argued, among other things, that the ADEA's charge requirement was satisfied by Respondent Kennedy's pre-charge intake questionnaire—even though the EEOC had not treated the intake questionnaire as a charge, the intake questionnaire was not served on FedEx as the ADEA requires for a charge, 29 U.S.C. § 626(d), and Kennedy filed a separate, formal charge against FedEx after suit was filed. R.8. Moreover, those

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[2] The filing of this charge triggered the EEOC's investigative machinery: it assigned the charge a number, gave FedEx notice of it on July 9, 2002, and sought information from FedEx for its investigation of the allegations. The EEOC closed its investigation of Kennedy's charge on November 13, 2002, because "Charging Party has filed a lawsuit . . . on the same basis and issues in a court of competent jurisdiction."

plaintiffs who had not filed anything with the EEOC argued that they should be allowed to "piggyback" on Kennedy's intake questionnaire in fulfillment of their own charge-filing requirements. The plaintiffs presented no evidence that Respondent Kennedy had believed, either reasonably or unreasonably, that the intake questionnaire she submitted constituted a charge. They submitted no proof that the EEOC had advised Kennedy that the intake questionnaire sufficed as a charge or otherwise misled her with regard to the effect of the intake form. In fact, the plaintiffs failed to submit any proof that Kennedy ever discussed the intake questionnaire with any EEOC representative. *See* R.8.

The District Court granted the motion to dismiss on the ground that no plaintiff had filed a timely charge of discrimination in fulfillment of the ADEA's charge-filing requirement. *Holowecki v. Federal Express Corp.*, 2002 WL 31260266, at *1, 6 (S.D.N.Y. 2002). The District Court rejected the plaintiffs' argument that Kennedy's submission of the intake questionnaire in December 2001 satisfied the charge requirement and, as a result, also rejected their argument that the other plaintiffs could "piggyback" on Kennedy's intake form in fulfillment of their own charge requirements. *Id.* at *4.

The Second Circuit reversed on appeal, however. It concluded that Respondent Kennedy could sue FedEx without having filed a timely charge of discrimination, without having had the EEOC investigate her allegations or seek to resolve them and, indeed, without having provided FedEx with notice of any sort before proceeding with suit. *Holowecki v. Federal Express Corp.*, 440 F.3d 558 (2d Cir. 2006). The Second Circuit then compounded this abrogation of pre-suit requirements under the ADEA by permitting eleven of the other named plaintiffs to "piggyback" on Kennedy's suit

without themselves having met any of the pre-suit requirements of the statute. *Id.* at 569. The sole basis for this abrogation of the statute's requirements was Kennedy's decision to complete the EEOC intake questionnaire, which had not been treated as a charge by Kennedy or the EEOC and which gave FedEx no notice of Kennedy's personal claims, much less those of the eleven other "piggybacking" plaintiffs. *Id.* at 568–69.

The Second Circuit viewed this misuse of an intake form as permissible because the form contained the minimal information found in an EEOC charge. *Id.* at 568. In so holding, the Second Circuit ignored the practical use of—and the express statutory purpose for—that required information: to give notice to the allegedly discriminating employer so that the claims might be resolved without a suit and to initiate the EEOC's apparatus for deciding whether to pursue suit itself or permit a private plaintiff to proceed on her own. *Id.* at 568–69; *cf.* 29 U.S.C. § 626(d).

FedEx timely petitioned for rehearing or rehearing *en banc*, but the Second Circuit denied that request on October 31, 2006. *See* Pet. App. at 1a–2a.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question of federal law that has not been, but should be, settled by this Court, *see* S. Ct. R. 10(b), and on which the Circuit Courts of Appeal are in conflict, *see* S. Ct. R. 10(a): When may a document that fails to fulfill the statutory functions of the pre-suit "charge" of discrimination required by the ADEA nevertheless constitute a charge? The answer to that question is of paramount importance to the continued vitality of Congress's vision that employers and employees engage in

voluntary, conciliatory efforts to resolve discrimination claims, and that employees exhaust administrative remedies, before a suit is filed.

This Court should grant certiorari review to resolve this dispute between the circuits and to draw the appropriate line between, on the one hand, respecting the system of adjudication created by Congress under which charges are the mechanism triggering notice to the employer and conciliation efforts by the EEOC, and, on the other hand, avoiding the potentially harsh effects of holding that no charge has been filed by employees who have been led to believe they have filed a charge. Allowing the decision of the Second Circuit to stand without articulating clear guidance on this issue will only foster continued division among the circuits and further slippage from the statutory framework envisioned by Congress.

I. THIS CASE RAISES THE IMPORTANT QUESTION OF WHEN A DOCUMENT THAT FAILS TO FULFILL THE FUNCTIONS OF A CHARGE MAY NEVERTHELESS CONSTITUTE A CHARGE.

The question presented in this case—whether and under what circumstances a document containing the minimum information required for a charge under the ADEA but failing to fulfill the congressionally intended functions of a charge may nevertheless suffice as a charge—is critically important because it determines two major issues: (1) who is permitted to bring a lawsuit alleging discrimination in violation of the ADEA; and (2) whether Congress's framework requiring charge-filing will be respected so that the EEOC can reduce age discrimination and, consequently, litigation over age discrimination.

Congress has determined that the EEOC is often in the best position to prevent, and resolve claims of, age discrimination. As a result of that determination, Congress requires an employee to file a timely charge of discrimination with the EEOC before she may bring a lawsuit alleging age discrimination. 29 U.S.C. § 626(d). This charge-filing requirement is designed to give the EEOC an opportunity, before suit is filed, to provide an employer with notice of the allegations of discrimination, to investigate such allegations, to seek conciliation between the employer and employee, and to decide whether it should pursue suit against the employer or allow the employee to file suit herself. *See, e.g.*, *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.2d 1208, 1220 (11th Cir. 2001); *Dezaio v. Port Auth. of N.Y. & N.J.*, 205 F.3d 62, 64–65 (2d Cir. 2000); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 542 (7th Cir. 1988); *Bihler v. The Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983). Thus, the filing of a charge triggers the EEOC's obligation to fulfill two important statutory duties: (1) "promptly notify[ing] all persons named in such charge as prospective defendants in the action"; and (2) "seek[ing] to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." 29 U.S.C. § 626(d). An employee who fails to bring a charge within the requisite time period, or to provide the EEOC with adequate time to perform its notice and conciliation duties after the filing of a charge, is barred from suing for age discrimination in court.[3] *See* 29 U.S.C. § 626(d) ("No civil action may be commenced" unless the

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[3] To be timely, the charge must be filed within 180 days after the occurrence of the alleged unlawful practice, except in states with their own age discrimination laws and remedial agencies, where the time is extended to 300 days. 29 U.S.C. §§ 626(d), 633(b). In addition, an employee must wait for sixty days after filing her charge before bringing suit in court. 29 U.S.C. § 626(d).

time requirements are met); *see also, e.g.*, *O'Neill v. N.Y. Times Co.*, 145 Fed. Appx. 691, 694 (1st Cir. 2005) (affirming dismissal of claim as time-barred where charge was filed more than 300 days after employee was put on notice of age discrimination); *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir. 2004) (affirming dismissal of ADEA claims where employee filed suit before expiration of sixty-day post-charge waiting period). Obviously, then, the question of what constitutes a charge is crucial.

Yet the ADEA does not define what constitutes a charge. To ensure that it has information sufficient to fulfill its congressional mandates of notification and conciliation, the EEOC has established interpreting regulations specifying the minimum components of a charge under the ADEA. A charge must be filed with the EEOC and must be in writing. 29 C.F.R. §§ 1626.3, 1626.6, 1626.8. A charge must name the employer and generally describe the allegedly discriminatory acts. 29 C.F.R. § 1626.6. In addition, a charge should contain the full contact information for the employer and the person filing the charge, a "statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices," the approximate number of employees of the prospective defendant employer, and information about any state proceedings involving the alleged unlawful employment practice at issue. 29 C.F.R. § 1626.8. The EEOC has also established a formal charge form, EEOC Form 5, which, when completed, satisfies these regulations and unquestionably constitutes a charge under the ADEA.

Many times, however, an employee submits a document to the EEOC that may contain the minimum required information for a charge, but is not on the EEOC's formal charge form. For instance, an employee may send a letter to the EEOC naming the employer and generally describing

alleged discriminatory acts. *See, e.g.*, *Bihler v. The Singer Co.*, 710 F.2d 96, 97–98 (3d Cir. 1983); *Thomure v. Phillips Furniture Co.*, 30 F.3d 1020, 1025–26 (8th Cir. 1994). More commonly—as in this case—an employee completes an intake questionnaire form, EEOC Form 283, which the EEOC uses to collect information about allegedly discriminatory practices. Such a form, when completed, will almost always contain the minimum required information for a charge.

At times, the EEOC treats such informal documents as charges, providing notice of them to prospective defendant employers and starting investigation and conciliation efforts. *See, e.g.*, *Philbin v. Gen. Elec. Capital Auto Lease, Inc.*, 929 F.2d 321, 322 (7th Cir. 1991) (EEOC assigned a charge number to employee's intake questionnaire and sent a Notice of Charge of Discrimination to employer); *Price v. Sw. Bell Tel. Co.*, 687 F.2d 74, 76 (5th Cir. 1982) (EEOC sent a Notice of Charge of Discrimination to employer based on employee's completion of intake questionnaire); *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1321 (11th Cir. 2001) ("after some prodding" by employee, EEOC treated her intake questionnaire as a charge and "issued belated notice of the charge" to her employer); *Sylvester v. Am. Online, Inc.*, 2006 WL 1793289, at *4 (D. Utah 2006) ("EEOC acted on the Intake Questionnaire to serve notice on AOL.").

Generally, however—and as in this case—the EEOC does not treat such informal documents as charges, neither providing notice of them to prospective defendant employers nor beginning investigation and conciliation efforts. *See, e.g.*, *Holowecki*, 740 F.3d at 561 (EEOC did not give employer notice of intake questionnaire and did not institute investigation or conciliation efforts); *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1240 (11th Cir. 2004) (same); *Casavantes v. Cal. State Univ.*, 732 F.2d 1441, 1443 n.2 (9th

Cir. 1984) (same); *Diez v. Minn. Mining & Manuf. Co.*, 88 F.3d 672, 674 (8th Cir. 1996) (same); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 543 (7th Cir. 1988) (same); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1137-38 (7th Cir. 1993) (same).

This latter practice gives rise to the important question of whether and when an intake questionnaire or other pre-charge document that has not been treated as a charge by the EEOC can nevertheless constitute a charge for purposes of the ADEA. In other words, in what circumstances may an intake questionnaire or pre-charge document constitute a charge even when it fails to fulfill the congressional purposes for a charge; namely, even if it fails to trigger notice to the employer or investigatory and conciliatory efforts by the EEOC?

This question has important ramifications. Allowing intake questionnaires or other pre-charge documents failing to fulfill the functions of charges to constitute charges will lead to increased litigation because doing so passes the important process of pre-litigation conciliation. If the EEOC has not treated a document as a charge, efforts at conciliation will not occur and fewer claims will be resolved prior to litigation. Increased litigation is detrimental for all parties involved. It is bad for employees, who will be forced to wait longer for a resolution and incur the legal expenses of litigating their claims. It is bad for employers, who will be forced to defend themselves against allegations of which they received no notice. In addition, employers are significantly penalized if deprived of the opportunity to resolve claims without litigation because they may be liable for the employee's attorney's fees once suit is filed. *See Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 1001 (10th Cir. 2005) ("Attorney fees may be awarded to the prevailing party in age-discrimination cases through the ADEA's incorporation of

remedies available under the Fair Labor Standards Act. *See* 29 U.S.C. § 626(b).").

And, increased litigation burdens courts, which will have to devote more resources to resolving disputes under the ADEA. *See U.S. v. Dieter*, 429 U.S. 6, 97 S. Ct. 18 (1976) (noting that the Court must be "wary of imposing added and unnecessary burdens on the courts of appeals"); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 212, 114 S. Ct. 1461 (1994) (rejecting a proposed outcome because it would "burden the courts with additional litigation"); *cf. Davis v. U.S. Steel Supply*, 688 F.2d 166, 193 (3d Cir. 1982) (Sloviter, J., dissenting) ("The advantages . . . of a procedure whereby disputes may be resolved by conference, conciliation and persuasion are evident: an unrepresented claimant may seek and sometimes be awarded relief; the parties may informally resolve their differences without the bitterness engendered by litigation; and the courts are spared the additional burden of yet more lawsuits.").

Allowing intake questionnaires failing to fulfill the functions of charges to constitute charges also frustrates Congress's intention that suits alleging age discrimination be timely brought to prevent stale claims. Under the ADEA, a plaintiff is required to bring suit within ninety days of receiving notice that the EEOC proceedings have been terminated. *See* 29 U.S.C. § 626(e).[4] If the EEOC does not

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[4] Under the ADEA—unlike under Title VII, 42 U.S.C. §§ 2000e-5(f)(1), and the Americans with Disabilities Act, 42 U.S.C. §§ 12117—receipt of a notice of right to sue is not a condition precedent to bringing suit. *See* 29 U.S.C. § 626(d); *Julian v. City of Houston*, 314 F.3d 721, 725–27 (5th Cir. 2002); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1100 (11th Cir. 1996); *Seredinski v. Clifton Precision Prod. Co.*, 776 F.2d 56, 63 (3d Cir. 1985). The ADEA

view an intake questionnaire as a charge, however, it does not institute proceedings and, as a result, will never issue notice that its proceedings have terminated. Thus, there will be no limitation on how long an employee may wait before bringing suit. In other words, once an employee has submitted an intake form within the requisite time period for charges, she can wait indefinitely to bring her suit. This means that the employee could bring suit against the employer for actions that occurred years earlier and of which the employer never received notice.

Such delayed notice of alleged discriminatory acts is problematic because it deprives employers of the opportunity to detect and correct potentially discriminatory employment practices in a timely and efficient manner, thus undercutting the ADEA's primary goal of preventing unlawful discrimination. *See Zinger v. Blanchette*, 549 F.2d 901, 905 (3d Cir. 1977) ("The primary purpose of the [ADEA] is to prevent age discrimination in hiring and discharging workers."). Moreover, it requires employers to defend themselves against claims based on incidents that occurred years earlier. These employers, having received no notice of the employee's allegations against them, may have destroyed the pertinent employment records under a reasonable record-retention policy, only to be informed later of the employee's stale claims against which they must defend.

Finally, the question of whether and in what circumstances intake questionnaires may constitute charges dramatically affects the EEOC's workload. If intake questionnaires constitute charges, they trigger the EEOC's

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requires only that suit be brought within ninety days if a notice of right to sue is received. 29 U.S.C. § 626(e).

statutory obligations with regard to charges. Thus, the EEOC will be required to provide notice to employers and to effectuate conciliation efforts based on intake questionnaires, rather than formal charges. Since 1997, the EEOC has processed between 75,000 and 80,000 charges per year, which is an unknown fraction of the probably much higher number of completed intake questionnaires that it receives. *See* U.S. Equal Employment Opportunity Commission, Charge Statistics FY 1997 through FY 2006, http://www.eeoc.gov/stats/charges.html (last visited March 29, 2007).[5] Furthermore, the unanswered question of what constitutes a charge for ADEA purposes extends beyond intake questionnaires. If the formal charge process is abandoned, the EEOC will be required to treat every document that includes the minimal information required for a charge as a formal charge triggering the investigatory machinery of the agency. Some circuits have recognized the danger in this course. *See, e.g., Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992) (warning against treating intake questionnaires "willy nilly" as charges); *Bost*, 372 F.3d at 124 (same); *Steffen*, 859 F.2d at 542 (rejecting argument that would treat every questionnaire and most phone messages as charges). Therefore, concluding that intake questionnaires—and other pre-charge documents—constitute charges will lead to a significant increase in the EEOC's workload.

As demonstrated, whether and in what circumstances intake questionnaires and other pre-charge documents can constitute charges has important ramifications for employers, employees, the EEOC, and courts, as well as for the vitality

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[5] The EEOC does not report on its website the number of completed intake questionnaires it receives annually.

of Congress's vision for the ADEA. Moreover, this question is not only significant, but it has divided the circuits, as discussed next.

II. THE CIRCUITS ARE DIVIDED ON THIS IMPORTANT ISSUE.

Six federal circuits have addressed the question of whether and in what circumstances an intake questionnaire may constitute a charge under the ADEA, and other circuits have considered the subject with regard to different discrimination statutes.[6] The circuits have reached contradictory conclusions. *See Pijnenburg v. W. Ga. Health Sys., Inc.*, 255 F.3d 1304 (11th Cir. 2001) ("On appeal, plaintiff asks us to treat an 'intake questionnaire' as a charge. . . . [T]he circuits are divided on this point."); *see also Smith v. Video Servs. of Am., L.P.*, 2000 WL 1521606, at *3 (E.D. Pa. 2000) ("[T]he circuits are split regarding whether EEOC Intake Questionnaires can fulfill the charge-filing requirement . . . ."). Therefore, review by this Court is both necessary and appropriate. *See* S. Ct. R. 10(a) (a compelling reason for granting certiorari is when "a United States court

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[6] The charge-filing requirements for the ADEA and other discrimination statutes are similar, but not identical. For instance, a charge under the ADEA need not be verified, while a charge under Title VII and the ADA must be. *See Diez v. Minn. Mining & Manuf. Co.*, 88 F.3d 672, 675 (8th Cir. 1996) ("Unlike Title VII, the ADEA does not require that a charge be verified."); *Zillyette v. Capital One Finan. Corp.*, 179 F.3d 1337, 1339 (11th Cir. 1999) (ADA plaintiffs must comply with same procedural requirements for suit as plaintiffs in Title VII cases). Therefore, while a decision in one context about whether an intake questionnaire constitutes a charge may be instructive, it does not necessarily determine the issue with regard to other contexts.

of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

A. Circuits suggesting that intake questionnaires are not charges at all.

Two circuits have suggested that an intake questionnaire simply does not constitute a charge for purposes of the ADEA. In *Dorn v. General Motors*, the Sixth Circuit rejected the plaintiffs' contention that their submission of an EEOC questionnaire constituted a charge. 131 Fed. Appx. 462, 470 n.7 (6th Cir. 2005). According to the *Dorn* court, "the questionnaire was not a formal charge of discrimination within the meaning of the ADEA" and "the statutory language requiring a formal charge, not an inquiry or complaint, is clear." *Id.*

Likewise, in *Bailey v. United Airlines*, the Third Circuit addressed an employee's claim that he had exhausted his administrative remedies pursuant to the ADEA because he had submitted an EEOC intake questionnaire within the applicable limitations period. 279 F.3d 194, 199 n.2 (3d Cir. 2002). Although the *Bailey* court concluded that the employee had waived the argument by failing to adequately raise it before the district court, it went on to state that, "even were the argument not waived, the intake questionnaire was not adequate to constitute a charge sufficient to toll the limitations period." *Id.*

B. Circuits concluding that intake questionnaires may be charges in limited circumstances.

Three other circuits—the Seventh, Eighth, and Eleventh—have specifically recognized that "an intake

questionnaire is not intended to function as a charge." *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir.); *accord Steffen*, 859 F.2d at 542 (7th Cir.); *Diez*, 88 F.3d at 676 (8th Cir.). These circuits have also recognized that where an intake questionnaire fails to fulfill the twin purposes of a charge—notice and conciliation—treating the document as a charge undermines Congress's purpose for the ADEA. *See Diez*, 88 F.3d at 676–77 (8th Cir.) ("If the EEOC . . . understands the claimant's lodging of the questionnaire to be preliminary, it does not notify the employer of the charge. This frustrates a major goal of the ADEA, which is to encourage pre-litigation resolution of claims."); *Steffen*, 859 F.2d at 542–43 (7th Cir.); *Bost*, 372 F.3d at 1240 (11th Cir.). These circuits have therefore concluded that an intake questionnaire can substitute for a charge under the ADEA only in limited circumstances.

First, the Seventh and Eleventh Circuits have determined that an intake questionnaire can equal a formal charge under the ADEA when it contains all the information that a charge would contain and the EEOC treats it as a charge. *See Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992); *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241 (11th Cir. 1989). This approach, which the Seventh Circuit calls "substantial compliance," recognizes that when "the EEOC itself treats the Intake Questionnaire as the formal charge"—providing notice to the employer and instigating conciliatory efforts—"it is hard to see what more to ask of the employee." *Early*, 959 F.2d at 80–81. Similarly, the Fifth Circuit has concluded that, for purposes of Title VII, an intake questionnaire can be a charge where the EEOC has treated it as one. *See Price v. Sw. Bell Tel. Co.*, 687 F.2d 74, 78–79 (5th Cir. 1982) (concluding that an employee's completed intake questionnaire constituted a charge for purposes of Title VII because the EEOC had treated it as a

charge by providing notice of it to the prospective defendant employer).

Second, the Seventh and Eleventh Circuits will allow an intake questionnaire to constitute a charge—even if the EEOC has not treated it as a charge—if there is evidence showing that the employee reasonably believed the form sufficed for a charge. *See Steffen*, 859 F.2d at 544 (7th Cir.) ("[T]he EEOC informed Steffen that it would be treating the Intake Questionnaire as a charge but then failed to treat it as a charge."); *Bost*, 372 F.3d at 1240–41 (11th Cir.) (citing *Wilkerson*, 270 F.3d at 1320–21 (11th Cir.), where the court found that the employee could reasonably believe that the EEOC would protect her interests with regard to her charge based on its communications to her, and where the form itself indicated that it could be a charge). In other words, where it is reasonable for an employee to believe that her intake form constitutes a charge—particularly where that belief is based on communications from the EEOC about the effect of the form—the Seventh and Eleventh Circuits allow that document to constitute a charge. The Eighth Circuit has suggested, although never held, that it may also allow an intake questionnaire to constitute a charge under the ADEA

in these circumstances. *See Diez v. Minn. Mining & Manuf. Co.*, 88 F.3d 672, 677 (8th Cir. 1996).[7]

Where there is no evidence of such a reasonable belief by the employee, however, the Seventh, Eighth and Eleventh Circuits do not allow an intake questionnaire that has not been treated as a charge by the EEOC to function as a charge. *See Steffen*, 859 F.2d at 542–44 (7th Cir.) (rejecting plaintiff's argument that an intake questionnaire constituted a charge even in the absence of evidence showing employee's reasonable belief it would be treated as a charge); *Perkins v. Silverstein*, 939 F.2d 463, 470 (7th Cir. 1991) (intake questionnaire did not constitute a charge where employee could not reasonably believe that it was a charge because the EEOC had told him that no further action would be taken on it); *Diez*, 88 F.3d at 677 (intake questionnaire was not a charge because there was no evidence that the state agency "led [employee] to believe he had done all that was necessary once he returned the questionnaire" and the questionnaire itself indicated that it was preliminary to a charge); *Bost*, 372 F.3d at 1240–41 (11th Cir.) ("This case lacks the exceptional circumstances relied on by the *Wilkerson* Court in concluding that the intake questionnaire in that case was a charge. . . . Bost clearly understood that the intake questionnaire was not

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[7] Similarly, although the Third Circuit later decided that an intake questionnaire did not constitute a charge for purposes of the ADEA, *see Bailey v. United Airlines, supra*, in an earlier case it was careful not to foreclose the possibility that a document other than a formal charge may constitute a charge. *Bihler v. The Singer Co.*, 710 F.2d 96, 99–100 (3d Cir. 1983). The *Bihler* court did not detail the circumstances in which that may be true, however, other than holding that it is not true, as a matter of law, when a reasonable person would not believe that the document at issue constituted a charge. *Id.*

a charge . . . there is no evidence of any misleading communication between Bost and the EEOC . . . [and] the questionnaire form itself did not suggest that it was a charge.").

Accordingly, in the Seventh, Eighth, and Eleventh Circuits, an intake questionnaire constitutes a charge only in certain, limited circumstances.

C. Circuits concluding that all intake questionnaires are charges.

The Second Circuit has reached yet a different conclusion. Unlike the Third and Sixth Circuits—which have never found an intake questionnaire to constitute a charge under the ADEA—and the Seventh, Eighth, and Eleventh Circuits—which have found intake questionnaires failing to fulfill the functions of notice and conciliation to constitute charges only where there are strong indications that the employee reasonably believed the questionnaire was sufficient—the Second Circuit's decision in this case allows any "written filing that complies with the ADEA and contains the information required by EEOC interpreting regulations" to suffice as a charge, even when that document does not fulfill the functions of a charge and there is no evidence that the employee reasonably believed it would suffice as a charge. *See Holowecki v. Federal Express Corp.*, 440 F.3d 558, 567-69 (2d Cir. 2006).[8]

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[8] In fact, the Second Circuit's abrogation of the charge-filing requirement is compounded further because it allows other plaintiffs—who never filed anything with the EEOC—to piggyback on another plaintiff's intake questionnaire to satisfy their own charge requirements. *See Holowecki*, 440 F.3d at 569.

By its decision, the Second Circuit has aligned itself with the Fourth and Ninth Circuits, which have held in the context of Title VII that documents failing to serve the functions of a charge may constitute a charge even in the absence of any evidence regarding the plaintiff's reasonable belief. In *Edelman v. Lynchburg College*, the Fourth Circuit held that a professor's letter to the EEOC, which the EEOC did not treat as a charge, constituted a charge because it included the requisite information for a charge. 300 F.3d 400 (4th Cir. 2002). The *Edelman* court did not require evidence of the employee's reasonable belief that the letter would suffice as a charge. *See id.* In fact, the Fourth Circuit concluded that the letter constituted a valid charge even though the evidence showed the opposite: just two weeks after Edelman had submitted his letter, the EEOC had informed Edelman that his letter was insufficient and that it would need more information from him. *See id.* at 403, 405.

In *Casavantes v. California State University*, the Ninth Circuit determined that an intake questionnaire, which the EEOC had not treated as a charge, nevertheless constituted a charge under Title VII because it was a "written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of," as the EEOC's regulations require charges to do. 732 F.2d 1441, 1443 (9th Cir. 1984). Like the *Edelman* court, the *Casavantes* court reached this conclusion without regard to whether the employee had reasonably believed that the questionnaire he submitted was sufficient. *See id.*

Thus, in the Second Circuit—and likely in the Fourth and Ninth Circuits as well—any intake questionnaire containing the minimum information required for a charge will constitute a charge for purposes of the ADEA, regardless of whether the

EEOC or the employee considered the questionnaire to be a charge.

D. The *Bost/Holowecki* example.

The split between the circuits on this issue is most dramatically illustrated by comparing the Second Circuit's decision below with the Eleventh Circuit's decision in *Bost v. Federal Express Corp.*, 372 F.3d 1233 (11th Cir. 2004). Although the facts of these two cases are identical, the Second and Eleventh Circuits reached opposite conclusions.

Both *Holowecki* and *Bost* were putative class actions involving allegations that FedEx violated the ADEA through unfair application of performance standards to older couriers.[9] *See Holowecki*, 440 F.3d at 561–62; *Bost*, 372 F.3d at 1236. In *Bost*, none of the named plaintiffs had filed a timely formal charge of discrimination with the EEOC. *See Bost*, 372 F.3d at 1243. And in *Holowecki*, only a few of the named plaintiffs had filed colorable charges, some of which were clearly untimely and others of which were of questionable timeliness. *See Holowecki*, 440 F.3d at 569–70. In both cases, however, a single named plaintiff had filed an intake questionnaire within the time limits required for charges. *See Bost*, 372 F.3d at 1236; *Holowecki*, 440 F.3d at 563. Therefore, the crucial issue for most of the plaintiffs in both cases was whether that intake questionnaire constituted a charge, such that they could proceed with their ADEA claims. *See Bost*, 372 F.3d at 1235; *Holowecki*, 440 F.3d at 568.

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[9] Not only was the defendant, FedEx, the same in both cases, but at least one of the named plaintiffs was also the same. Phyllis Nelson was a named plaintiff in both *Bost* and *Holowecki*. *See Bost*, 372 F.3d at 1236; *Holowecki*, 440 F.3d at 558.

Notably, the completed intake questionnaires in *Holowecki* and *Bost* were identical in every meaningful respect. In *Holowecki*, the relevant questionnaire was submitted by Respondent Kennedy and consisted of the two-page Form 283 plus a five-page, typewritten affidavit notarized by Audrey Marie Maccia.[10] Pet. App. at 43a–52a. In *Bost*, the relevant questionnaire was submitted by Anthony Bost and consisted of the two-page Form 283 plus a six-page, typewritten affidavit notarized by Audrey Marie Maccia. Pet. App. at 53a–61a. Both Kennedy and Bost asserted claims of discrimination against FedEx at its Dunedin, Florida, facility. Pet. App. at 43a–44a, 53a–54a. Specifically, the questionnaires submitted by Kennedy and Bost both alleged that FedEx discriminated against them because of their age by using a program known as "Best Practices Pays" to impose unattainable performance standards on older, but not younger, couriers. Pet. App. at 45a–51a, 55a–60a. Both questionnaires also asserted that FedEx has discriminated against its older couriers by unilaterally delaying their start times. Pet. App. at 48a–50a, 56a–60a. In fact, at least four sentences are identical—word-for-word—in the Bost and Kennedy questionnaires. *Compare* Pet. App. at 49a–50a with *id.* at 57a.

And the similarities did not end there. The actions of Kennedy, Bost, and the EEOC after the filing of the questionnaires were also identical in every relevant respect. Kennedy submitted her questionnaire to the EEOC on December 3, 2001, *see Holowecki*, 440 F.3d at 568; Bost submitted his questionnaire just two weeks later, *see Bost*,

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[10] The first page of Kennedy's Form 283 makes clear that it was a two-page document, *see* Pet. App. at 43a, but the *Holowecki* plaintiffs inexplicably produced only the first page in the proceedings below.

372 F.3d at 1236. Upon receiving the questionnaires, the EEOC did not treat either one like a charge: it did not assign them charge numbers, send FedEx notice of them, or use them to begin conciliation efforts. *See Bost*, 372 F.3d at 1240–41; *Holowecki*, 440 F.3d at 561. Then, in April 2002—approximately five months after filing her intake questionnaire and without having filed a formal charge—Kennedy, with the other *Holowecki* plaintiffs, filed suit against FedEx in the Southern District of New York. *See Holowecki*, 440 F.3d at 568. One month later, Kennedy filed a formal charge of discrimination with the EEOC. *Id.* at 563. Likewise, in May 2002—approximately five months after filing his intake questionnaire and without having filed a formal charge—Bost, with the other *Bost* plaintiffs, filed suit against FedEx in the Middle District of Florida. *Bost*, 372 F.3d at 1239. One month later, Bost, like Kennedy before him, also filed a formal charge of discrimination with the EEOC. *Id.*

In court, the *Holowecki* and *Bost* suits again proceeded in the same way. Because none of the named plaintiffs in either case had submitted a timely charge of discrimination, FedEx moved to dismiss both suits for failure to exhaust administrative remedies. *See Bost*, 372 F.3d at 1237; *Holowecki*, 440 F.3d at 561. And both the Southern District of New York and the Middle District of Florida granted FedEx's motions, concluding that the intake questionnaires did not constitute charges under the ADEA and, therefore, that none of the named plaintiffs had complied with the ADEA's time-limit requirements under 29 U.S.C. § 626(d). *See Bost*, 372 F.3d at 1237; *Holowecki*, 440 F.3d at 561. Then, the plaintiffs in both cases appealed: the *Holowecki* plaintiffs to the Second Circuit, and the *Bost* plaintiffs to the Eleventh Circuit. And that is where, for the first time, the cases diverged.

In *Bost*, the Eleventh Circuit agreed with the Middle District of Florida that Bost's intake questionnaire did not constitute a charge. 372 F.3d at 1235. The *Bost* court reached this conclusion because the EEOC had not treated Bost's questionnaire as a charge and because there was no evidence that Bost had reasonably believed the questionnaire was sufficient. *Id.* at 1240–41. Instead, the Eleventh Circuit noted, "the undisputed evidence show[ed] the opposite": Bost's subsequent filing of a formal charge showed that he did not believe the questionnaire was a charge; there was no evidence of any misleading communication by the EEOC; and the questionnaire form itself indicated "to a reasonable reader that the questionnaire was not a charge." *Id.* at 1241. Therefore, the Eleventh Circuit affirmed the dismissal of the *Bost* plaintiffs' ADEA claims. *Id.* at 1243.

Despite the likeness of the cases, however, the Second Circuit reached precisely the opposite conclusion in *Holowecki*. It determined that the intake questionnaire submitted by Kennedy constituted a charge merely because it contained the requisite information for a charge—regardless of the fact that the questionnaire had failed to fulfill the notice and conciliation functions of a charge and the complete lack of evidence that Kennedy had believed the questionnaire to be a charge.[11] *Holowecki*, 440 F.3d at 561, 568–69. Therefore, the Second Circuit reversed the dismissal of the *Holowecki* case and remanded for further proceedings. *Id.* at 570.

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[11] In fact, as in *Bost*, the evidence actually showed that Kennedy did not believe her intake questionnaire constituted a charge, as demonstrated by her subsequent completion and submission of a formal charge. *See Holowecki*, 440 F.3d at 569.

The conflicting outcomes of *Bost* and *Holowecki* are even more striking in light of the fact that both circuits purported to use the same test. Since the Third Circuit's decision in *Bihler v. The Singer Co.*, 710 F.2d 96 (3d Cir. 1983), *see supra note* 7, a number of federal circuit courts have used the term "manifest intent" to encapsulate the notion that a document not treated as a charge by the EEOC may suffice as a charge if there are manifestations of intent by the employee to spur the EEOC to initiate its notice-giving and investigatory processes. *See, e.g.*, *Bost*, 372 F.3d at 1240; *Holowecki*, 440 F.3d at 566; *Downes*, 41 F.3d at 1139; *see also Steffen*, 859 F.2d at 544; *Diez*, 88 F.3d at 676–77.

In its decision below, the Second Circuit claimed to adopt the manifest intent test. *See Holowecki*, 440 F.3d at 566–67. Yet it interpreted that test to mean that any document constitutes a charge so long as the employee exhibited an intent to "activate the administrative investigatory and conciliatory processes"—regardless of whether the employee reasonably believed that she had filed a charge. *See Holowecki*, 440 F.3d at 567. This departs from the manifest intent test as applied in *Bost*—as well as that applied in the Seventh and Eighth Circuits—which, though using the same language to describe their inquiry, also considered the reasonable reliance of the employee in believing that the form she submitted constituted a charge. *See Bost*, 372 F.3d at 1241; *see also Steffen*, 859 F.2d at 544; *Diez*, 88 F.3d at 676–77.

The contradictory results in *Bost* and *Holowecki*—based on precisely the same facts and purportedly the same test—flaunt the fundamental disagreement between the circuits on the issue of intake questionnaires. Such inconsistent application of the law will persist unless this Court provides guidance regarding whether and in what circumstances intake

questionnaires and other pre-charge documents may constitute charges for purposes of the ADEA.

III. THIS COURT HAS PREVIOUSLY RECOGNIZED THE IMPORTANCE OF THE QUESTION PRESENTED IN THIS CASE BUT HAS NOT RESOLVED IT.

This Court has never decided whether any document other than a formal charge can nevertheless constitute a charge, as the Second Circuit correctly pointed out below. *See Holowecki*, 440 F.3d at 566 n.5 ("The Supreme Court has not directly addressed the question of whether a written submission to the EEOC that is not on an EEOC charge form is an EEOC charge."). This Court has, however, recognized the importance of the question. In *Edelman v. Lynchburg College*, 535 U.S. 106, 122 S. Ct. 1145, 152 L.Ed.2d 188 (2002), where this Court upheld the EEOC's regulation permitting "an otherwise timely filer to verify a charge after the time for filing has expired," the Court inquired about the charge issue extensively at oral argument. One of the disputes in *Edelman* was whether a letter to the EEOC by the employee describing alleged discrimination constituted a charge for purposes of Title VII. This Court expressed concern that a document that had not been treated as a charge by the EEOC—of which no notice was given to the employer and following which no investigation was instituted—could constitute a charge. Tr. of Oral Arg. 7–8, 10, 13–14, 16–18, 32–33, *Edelman*, 535 U.S. 106 (No. 00-1072). And in its subsequent written opinion, this Court indicated doubt that the letter in *Edelman* was a charge, noting that "at the factual level their view [that the letter was not a charge] has some support." *Edelman*, 535 U.S. at 119.

Ultimately, however, this Court declined to decide the charge issue at that time because it was unclear in *Edelman* whether the EEOC had treated the letter at issue as a charge. Tr. of Oral Arg. 9, *Edelman*, 535 U.S. 106 (No. 00-1072) ("Did the EEOC consider this a charge? We don't know whether it did."); *Edelman*, 535 U.S. at 118–19 ("Our judgment does not . . . reach the conclusion drawn by the District Court, and the single judge on the Court of Appeals, that Edelman's letter was not a charge under the statute because neither he nor the EEOC treated it as one."). Because it was not clear whether the EEOC had treated the letter as a charge, this Court remanded the question of whether it constituted a charge to the Fourth Circuit. *See Edelman*, 535 U.S. at 118–19. On remand, the Fourth Circuit held that the letter was a valid charge, even though the EEOC had not treated it as such and there was no evidence that the employee reasonably believed it sufficed as a charge. *Edelman v. Lynchburg College*, 300 F.3d 400, 404–05 (4th Cir. 2000).

As the Fourth Circuit's post-remand *Edelman* decision and the Second Circuit's decision below demonstrate, this important issue will continue to divide the circuits unless this Court provides guidance. Therefore, this Court should now take the opportunity to decide this crucial question, *see* S. Ct. R. 10(b). And, in determining whether intake questionnaires or other pre-charge documents can ever constitute a charge as envisioned by Congress, the Court should also address what reliance is required by another plaintiff who seeks to piggyback on such a pre-charge document to satisfy his own charge-filing requirement.

CONCLUSION

Because this case presents an important issue of federal law on which the circuits are divided and which has not been, but should be, settled by this Court, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10907

Date: Oct 31, 2006

Docket Number: 04-3376-cv
Short Title: Holowecki v. Federal Express
DC Docket Number: 02-cv-3355
DC: SDNY (NEW YORK CITY)
DC Judge: Honorable Lawrence McKenn

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of October two thousand six.

Holowecki v. Federal Express

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Federal Express Corp. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ _____
Motion Staff Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 04-3376-cv

[Filed March 8, 2006]

PAUL HOLOWECKI, PATRICIA KENNEDY, DONNA M. LEWIS, CHARLES MONCALIERI, PHYLLIS NELSON, ANDY KUBICKI, ELIZABETH TUCKER, STEVEN ALMENDAREZ, FRANK J. MARTINEZ, KELLY L. MARTINEZ, KEVIN McQUILLAN, KENNETH G. MUTCHLER, GEORGE ROBERTSON, NANCY THOMPICS, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

FEDERAL EXPRESS CORPORATION,
Defendant-Appellee.

Before: KEARSE, CALABRESI, and POOLER, *Circuit Judges*.

Plaintiffs, current and former employees of defendant, appeal from the October 23, 2002, judgment of the United

States District Court for the Southern District of New York (McKenna, J.) dismissing their age discrimination claims, based on federal and state law, for failure to file timely charges with the Equal Employment Opportunity Commission, *see* 29 U.S.C. § 626(d).

Reversed in part, vacated in part, and remanded.

DAVID L. ROSE (David M. Wachtel, on the brief), Rose & Rose, P.C., Washington, DC, for *Plaintiffs-Appellants*.

R. JEFFERY KELSEY, Memphis, TN, for *Defendant-Appellee*.

OPINION

POOLER, *Circuit Judge*.

Appellants, who are all at least 40 years of age and are currently or were formerly employed as couriers for appellee Federal Express Corporation ("FedEx"), filed an April 30, 2002, complaint on behalf of themselves and other similarly situated FedEx couriers, claiming that FedEx had engaged in a pattern and practice of employment procedures that discriminate based on age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, the New York State Human Rights Law ("NYHRL"), N.Y. Exec. Law §§ 290 *et seq.*, and the laws of several other states. The United States District Court for the Southern District of New York (McKenna, J.) dismissed the claims as time-barred, concluding that each named plaintiff failed to comply with the ADEA's time limit requirements under 29 U.S.C. § 626(d).

We disagree with the district court's dismissals of the plaintiffs' claims. Specifically, we hold that plaintiff Patricia Kennedy's Intake Questionnaire and accompanying verified affidavit, filed with the Equal Employment Opportunity Commission ("EEOC"), constituted an EEOC "charge" that satisfactorily fulfilled the ADEA's exhaustion requirements even though the EEOC never notified, or investigated, the employer. Furthermore, we conclude that Kennedy's EEOC charge was sufficient to permit the eleven named plaintiffs that *never* filed EEOC charges to take advantage of the "single filing" or "piggybacking" rule and thereby satisfy the ADEA's exhaustion requirements.

Finally, with respect to plaintiffs George Robertson and Kevin McQuillan, two individuals who *did* individually file administrative charges and received right-to-sue letters, we conclude that the district court erred in determining that these plaintiffs did not file their charges within 300 days after the alleged unlawful practice occurred, as is required by 29 U.S.C. § 626(d). We remand, however, for the district court to decide in the first instance whether the complaint, fleshed out by Robertson's affidavit, was sufficient to withstand a motion dismiss based on the ADEA's requirement that a claimant who receives a right-to-sue letter must bring suit in federal court within 90 days of receipt of the letter. *See* 29 U.S.C. § 626(e). Accordingly, we reverse in part, vacate in part, and remand for further proceedings in accordance with this opinion.

BACKGROUND

This case requires us to consider various time limits imposed on plaintiffs seeking to sue their employer under the ADEA. Appellants (also referred to as "Holowecki plaintiffs"), residents of several states, filed an April 30,

2002, complaint on behalf of themselves and other similarly situated FedEx couriers. The complaint alleged, *inter alia*, that, through policies initiated in 1994 and 1995—such as "Best Practices Pays" ("BPP") and "Minimum Acceptable Performance Standards" ("MAPS")—and through a pattern and practices that continued thereafter, FedEx had discriminated based on age. The Holowecki plaintiffs contended that BPP, MAPS, and related policies were intended to encourage older workers to leave the company before they wished to retire and to mask FedEx's efforts to terminate older workers based on age discrimination.

According to the complaint, for instance, after the initial implementation of the BPP and MAPS, FedEx continued to increase performance goals and apply these new goals in a way that discriminated against older couriers. For instance, at first, FedEx required that a courier work with her supervisor to agree upon "a reasonable and safe number of stops per hour on the courier's route that could reasonably be achieved." If the courier achieved this goal, she would receive enhanced pay for one pay period. "Over time, however, [FedEx] treated the goals as the minimum acceptable number of stops that older couriers were required to make to retain their positions. . . . [F]ailure of a courier to achieve that number was grounds for a 'performance reminder' and then disciplinary action up to and including termination." Older couriers, according to the complaint, were more often "written up" for occasional failures to meet these goals and "younger couriers were rarely disciplined for such matters." Furthermore, pursuant to these policies, any absence of more than 90 days became grounds for termination from employment. The complaint alleged a series of additional discriminatory practices based on age and claimed that these policies led to the termination and constructive discharge of a disproportionately high percentage of older couriers.

The district court dismissed the Holowecki plaintiffs' complaint without reaching the merits, ruling that all fourteen named plaintiffs failed to satisfy the ADEA's time limit requirements, *see* 29 U.S.C. § 626, and declining to exercise supplemental jurisdiction over plaintiffs' state law claims. Under 29 U.S.C. § 626(d) ("Section 626(d)"), an aggrieved person must file an EEOC charge at least 60 days *prior to* initiating an ADEA suit in federal court. In addition, if the allegedly discriminatory act occurs in a "deferral state," a state that has its own age discrimination law and its own age discrimination remedial agency, the charge must be filed within the earlier of 300 days after the alleged unlawful practice occurred or thirty days after a complainant receives notice of the termination of state law proceedings. *See* 29 U.S.C. § 626(d); *Id.* § 633(b); *Hodge v. New York Coll. of Podiatric Med.*, 157 F.3d 164, 166 (2d Cir. 1998). It is undisputed that all of the states relevant to this action are deferral states.[1]

Unlike Title VII, the ADEA does not require an aggrieved party to receive a right-to-sue letter from the EEOC before filing suit in federal court. *Compare* 29 U.S.C. § 626(d)-(e) *with* 42 U.S.C. § 2000e-5(e)-(f); *see Hodge*, 157 F.3d at 168 ("Whereas Title VII plaintiffs must receive a 'right-to-sue' letter from the EEOC before filing suit in court . . . ADEA plaintiffs need only wait 60 days after filing the EEOC charge."); *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057 (2d

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[1] *See, e.g., Bost v. Federal Express Corp.*, 372 F.3d 1233, 1238 (11th Cir. 2004) (noting that Florida is a deferral state); *Casteel v. Executive Bd. of Local 703 of Int'l Bhd. of Teamsters*, 272 F.3d 463, 466 (7th Cir. 2001) ("Illinois is a deferral jurisdiction."); *Hodge v. New York Coll. of Podiatric Med.*, 157 F.3d 164, 166 (2d Cir. 1998) ("New York is a 'deferral state.'").

Cir. 1990).[2] However, in the event that the EEOC issues a right-to-sue letter to an ADEA claimant, the claimant must file her federal suit within 90 days after receipt of the letter. *See* 29 U.S.C. § 626(e); *see also Julian v. City of Houston*, 314 F.3d 721, 726 (5th Cir. 2002) (acknowledging that Section 626(e) "establishes a ninety-day limitations period for the ADEA complainant who actually receives notice from the EEOC, [but] does not require a complainant to receive such notice before filing suit.").

While the ADEA's time limit requirements are subject to equitable modification or estoppel, *Dillman v. Combustion Eng'g, Inc.*, 784 F.2d 57, 59 (2d Cir. 1986), ADEA time limits "are not to be disregarded by courts out of a vague sympathy for particular litigants," *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984).

Three of the named Holowecki plaintiffs filed charges with the EEOC or an authorized state agency (collectively referred to as "EEOC") before bringing suit in federal court and eleven did not. Plaintiff Kennedy, a resident of Florida, filed an EEOC Intake Questionnaire form and accompanying verified affidavit on December 3, 2001, and an EEOC charge form on May 30, 2002. Kennedy did not receive a right-to-sue letter in conjunction with either of these filings. The verified affidavit, accompanying the Intake Questionnaire form, consisted of over four pages of text and alleged that FedEx had instituted a number of policies and practices that

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[2] In dicta, this court has stated that the ADEA requires a claimant to obtain a right-to-sue letter before bringing suit in federal court. *See Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001) (per curiam). In the ADEA context, the only requirement is that a claimant must bring suit in federal court within 90 days *if* she receives a right-to-sue letter.

discriminated based on age. It stated, for instance, that "as a result of [the Best Practice Pays] policy and procedure changes," FedEx had "fired and/or constructively terminated" older couriers and had otherwise discriminated against older couriers. Moreover, it named several practices, such as FedEx's goals with respect to the number of stops per hour, that had increasingly gotten worse since the initiation of the BPP and MAPS.

The district court determined (1) that Kennedy's EEOC Intake Questionnaire and affidavit was not an EEOC "charge" and therefore did not satisfy Section 626(d)'s requirement that a claimant file a charge before bringing suit in federal court, and (2) that Kennedy's May 30, 2002, EEOC charge form was untimely because it was not filed 60 days prior to filing the April 30, 2002, ADEA complaint in federal court. *See* 29 U.S.C. § 626(d). Appellee does not dispute that Kennedy's EEOC Intake Questionnaire form and accompanying affidavit would satisfy the 60 and 300 day time limits set out in 29 U.S.C. § 626(d)[3] if we consider them to be an EEOC charge. In appellee's view, however, the EEOC Intake Questionnaire and accompanying affidavit do not satisfy Section 626(d) because they are not properly considered to be an EEOC "charge."

Plaintiff Robertson, a resident of Illinois, filed an EEOC charge on December 1, 2000, and plaintiff McQuillan, a resident of New York, filed an EEOC charge on September 11, 1998. Although there was no question as to whether these constituted EEOC "charges" or as to whether these were filed 60 days prior to the initiation of the April 30, 2002 federal

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[3] As mentioned above the 90-day time limit is not relevant because Kennedy did not receive a right-to-sue letter.

complaint, the district court found that they failed to meet the Section 626(d) requirement that the EEOC charge be filed within 300 days after the occurrence of the allegedly discriminatory acts. Appellee argued below that these two plaintiffs, both of whom received right-to-sue letters from the EEOC, failed to satisfy the requirement that they bring their April 30, 2002 federal suit within 90 days of receipt of the letters. *See* 29 U.S.C. § 626(e). After McQuillan filed his September 11, 1998 charge, the EEOC issued a right-to-sue letter on June 11, 1999.

Appellee argues that Robertson's right-to-sue letter was *received* on or about April 25, 2001, but Robertson states, "under penalty of perjury," that it was *received* shortly after February 7, 2002, and thus satisfies Section 626(e) because it was received within 90 days of the April 30, 2002 federal suit. After Robertson filed his December 1, 2000, charge with the EEOC, providing a Lake Villa, Illinois address, the EEOC sent Robertson a right-to-sue letter, dated April 25, 2001. According to Robertson's declaration, submitted to the district court in opposition to appellee's motion to dismiss,[4] he moved from Lake Villa in March of 2001 and requested that the United States Postal Service forward his mail. The April 25, 2001, right-to-sue letter, however, somehow did not reach Robertson. In January or February of 2002, Robertson contacted the EEOC because he had not heard anything since the filing of his charge. In response, on February 7, 2002, the EEOC sent Robertson the April 25, 2001 right-to-sue letter.

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[4] On August 6, 2002, plaintiffs filed an unsigned copy of Robertson's declaration with the district court as an exhibit to their Memorandum in Opposition to the Defendant's Motion to Dismiss the Complaint. Subsequently, on August 14, 2002, plaintiffs filed a signed version of Robertson's declaration with the district court.

According to the record, eleven of the Holowecki named plaintiffs never filed anything approximating an EEOC charge. These non-filing plaintiffs claimed that their suit nonetheless did satisfy ADEA time limit requirements because of the single filing, or "piggybacking," rule. According to the piggybacking rule, "where one plaintiff has filed a timely EEOC complaint, other non-filing plaintiffs may join in the action if their individual claims aris[e] out of similar discriminatory treatment in the same time frame." *Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2d Cir. 1986) (internal quotation marks omitted). In cases such as this, when the allegedly discriminatory activity affects a large group, piggybacking is not allowed unless the filed charge provides "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim." *Tolliver*, 918 F.2d at 1058.

An individual who has previously filed an EEOC charge cannot piggyback onto someone else's EEOC charge. *See Levy v. United States Gen. Accounting Office*, 175 F.3d 254, 255 (2d Cir. 1999) (per curiam) (holding that individuals who filed administrative charge but failed to file federal suit within 90 days of receipt of right-to-sue letter as required by the ADEA could not take advantage of single filing rule); *see also Snell*, 782 F.2d at 1100 (stating that "non-filing plaintiffs" can take advantage of the rule). As noted by other Circuit Courts of Appeals, allowing an individual who has previously filed a charge to abandon that charge and piggyback onto the charges of another individual would too often frustrate the EEOC's statutorily-mandated efforts to resolve an individual charge through informal conciliation. *See, e.g., Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 557-58 (11th Cir. 1997) (quoting *Anderson v. Unisys Corp.*, 47 F.3d 302, 308-09 (8th Cir. 1995)). The Fifth Circuit Court of Appeals has stated, for instance that, "where the party wishing to

piggyback has filed his own EEOC charge," he is "bound by the parameters of his own EEOC charge, and cannot subsequently utilize the single filing rule to avoid the statute of limitations." *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1223-24 (5th Cir. 1995) (abrogated on other grounds). We agree with this analysis.

The eleven non-filing plaintiffs (also referred to as "the piggybacking plaintiffs") present three piggybacking theories on appeal, all of which the district court rejected. They argue that they can piggyback onto (1) Kennedy's December 3, 2001, EEOC Intake Questionnaire and accompanying affidavit or (2) Robertson's December 1, 2000, EEOC charge, both of which, in their view, satisfy the ADEA's time limit requirements. Additionally, the piggybacking plaintiffs contend that they can piggyback onto timely EEOC charges filed by parties to a separate Florida lawsuit that was dismissed prior to the initiation of this claim, *Freeman v. Federal Express Corp.*, No. 99-2466 (M.D. Fla. Sept. 25, 2000), *aff'd*, 2002 WL 187185 (11th Cir. Jan. 14, 2002), because the charges filed by those individuals put the EEOC and FedEx on notice about its allegedly nationwide discriminatory practices. None of the *Freeman* plaintiffs are parties to the *Holowecki* suit. None of the Holowecki named plaintiffs were parties to the Florida lawsuit, although some of them unsuccessfully tried to join in an amended *Freeman* complaint that the Florida district court dismissed as moot. *See Bost v. Federal Express Corp.*, 372 F.3d 1233, 1236-37 (11th Cir. 2004) (describing procedural history of *Freeman* litigation).

DISCUSSION

We construe the district court's ruling as a dismissal for failure to state a claim under Federal Rule of Civil Procedure

12(b)(6) rather than a dismissal for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Rule 12(b)(1) does not apply because the ADEA's time limits, which are subject to equitable modification, are not jurisdictional in nature. *See Dillman*, 784 F.2d at 59 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982)). We review a 12(b)(6) dismissal for failure to state a claim de novo. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 327 (2d Cir. 2005) (per curiam). When deciding whether plaintiffs satisfy the ADEA's time limit requirements, we accept all of plaintiffs' factual allegations as true and will only affirm the district court's dismissal if we are satisfied that plaintiffs can prove no set of facts that would entitle them to relief on their claims. *See Velez v. Levy*, 401 F.3d 75, 84 (2d Cir. 2005).

In reviewing the Rule 12(b)(6) ruling, it is proper for this court to consider the plaintiffs relevant filings with the EEOC and the declaration that Robertson submitted to the district court, none of which were attached to the complaint, because the Holowecki plaintiffs' rely on these documents to satisfy the ADEA's time limit requirements. "[W]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint, the court may nevertheless take the document into consideration in deciding the defendant's motion to dismiss, without converting the proceeding to one for summary judgment." *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (internal quotation marks omitted).

I. Kennedy's EEOC Intake Questionnaire and Affidavit

Both Kennedy and the piggybacking plaintiffs argue that, based on the circumstances of this case, Kennedy's EEOC Intake Questionnaire and accompanying affidavit constitute an

EEOC "charge." Accordingly, they contend, it is timely in accordance with 29 U.S.C. § 626(d) because it is a "charge" that satisfies both the 60 day and 300 day time limits. The piggybacking plaintiffs further argue that the scope of Kennedy's charge is sufficient to incorporate their age discrimination claims, thereby permitting them to piggyback. We agree on both accounts and reverse the district court's dismissal of these plaintiffs' claims.

A. Meaning of EEOC "Charge"

In order to decide whether Kennedy's EEOC Intake Questionnaire and accompanying affidavit constitutes an EEOC charge we first turn to the meaning of the statutory term "charge." The ADEA requires the filing of a timely charge with the EEOC but does not define the term "charge."[5] *See* 29 U.S.C. § 626(d). The EEOC has established interpreting regulations that specify the requisite information that must appear in a "charge." *See* 29 C.F.R. §§ 1626.3, 1626.6, 1626.8. The required content is minimal. For instance, a charge "is sufficient" when the EEOC receives "a . . . writing" (or information that an EEOC employee reduces to a writing) from the person making the charge that names the employer and generally describes the allegedly discriminatory acts. *See id.* § 1626.8(b) (citing *id.* § 1626.6). According to the regulations, a charge also "should contain," but is not required to contain, other information such as the full contact information for the

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[5] The Supreme Court has not directly addressed the question of whether a written submission to the EEOC that is not on an EEOC charge form is an EEOC charge. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 118 (2002) (declining, in a case involving Title VII, to reach the question of whether or not claimant's filing of unsworn statement to EEOC constituted a "charge").

employer and the individual filing the charge, and a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." *See id.* § 1626.8(a)(1)-(5).

Some Circuits have imposed an additional requirement, the "manifest intent" rule, that is not explicitly stated in the statute or interpreting regulations. According to these courts, for a written submission to the EEOC to constitute a "charge," it must manifest an individual's intent to have the agency initiate its investigatory and conciliatory processes. An oft-cited proposition of the Third Circuit is that "[i]n order to constitute a charge that satisfies the requirement of section 626(d), notice to the EEOC must be of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act's machinery." *Bihler v. Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983); *see Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1319 (11th Cir. 2001) (citing proposition favorably); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 542 (7th Cir. 1988) (same).

We agree with this proposition and hold that a writing submitted to the EEOC containing the information required by EEOC interpreting regulations is an EEOC "charge" for purposes of Section 626, only when the writing demonstrates that an individual seeks to activate the administrative investigatory and conciliatory process. We also agree that "notice to the EEOC must be of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act's machinery." *Bihler*, 710 F.2d at 99.

This interpretation of the meaning of "charge" recognizes that providing the EEOC with an opportunity "to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of [the ADEA]

through informal methods of conciliation, conference, and persuasion," 29 U.S.C. § 626(b), is "an essential element" of the ADEA's statutory scheme, *cf. Francis v. City of New York*, 235 F.3d 763, 768 (2d Cir. 2000) ("[E]xhaustion of administrative remedies through the EEOC [is] 'an essential element of Title VII's statutory scheme.'"). Receiving a charge provides the EEOC with an opportunity to notify the prospective defendants and seek conciliation. *See Tolliver*, 918 F.2d at 1057; *see also Dezaio v. Port Auth. of N.Y. & N.J.*, 205 F.3d 62, 65 (2d Cir. 2000). Without notice from the complainant, the EEOC is not provided with an opportunity to fulfill this statutory purpose. *See Schroeder v. Copley Newspaper*, 879 F.2d 266, 269 (7th Cir. 1989) ("'The efficient operation of the [EEOC] demands such notice' because 'Congress certainly did not intend the [EEOC] to squander its resources by investigating where no complaint has been filed.'") (quoting *Bihler*, 710 F.2d at 99).

While we fully recognize that administrative exhaustion is an important aspect of the ADEA, if an individual satisfactorily notifies the EEOC of her charge, she is not foreclosed from federal suit merely because the EEOC fails to follow through with notifying the employer and attempting to resolve the matter through "conciliation, conference, and persuasion." 29 U.S.C. § 626(b). To require this would be to hold individuals accountable for the failings of the agency. Moreover, we see no reason to require that the EEOC have provided misleading information to a complainant about the status of her charge. Regardless of what the EEOC communicates or fails to communicate to a party, a written filing that complies with the ADEA and contains the information required by EEOC interpreting regulations is an EEOC "charge" as long as it demonstrates a party's intent to activate the administrative process.

This Court has recognized, in the ADEA context, that it is not required that the EEOC has actually taken action before an individual, who otherwise satisfactorily filed a charge, can bring suit in federal court. *Hodge*, 157 F.3d at 167-68. In *Hodge*, we allowed a federal ADEA suit to go forward even though the EEOC had not terminated its investigation. In that case, the investigation of the charge had been held up due to the withdrawal of plaintiff's initial administrative charge pursuant to an agreement that was later deemed invalid. *Id.* We concluded that plaintiff need not re-file a charge or seek to reopen the administrative proceedings. *Id.* Since the EEOC had the charge for more than the "60-day period that Congress established for the EEOC to investigate or attempt conciliation before the ADEA plaintiff is allowed to file suit in court," we saw "no statutory purpose to be served by a refiling or reopening requirement, the effect of which would be the imposition of additional delays, including another 60-day waiting period." *Id.* at 168. We cited *Bihler*, 710 F.2d at 99 n.7, for the proposition that "[s]uch a holding would establish a prerequisite to suit beyond a prospective plaintiff's control and therefore would be contrary to the spirit and purpose of the Act." *Hodge*, 157 F.3d at 168. This reasoning equally applies when an individual has manifested her intent to activate the administrative process. A complainant should not be held accountable if the EEOC fails to follow through after that complainant has provided written notice to the EEOC "that would convince a reasonable person" that she intends "to activate the Act's machinery," *Bihler*, 710 F.2d at 99.

B. Kennedy's EEOC Questionnaire as EEOC Charge

Now that we have described the requirements for an EEOC "charge" we turn to the particular circumstances of this case. Kennedy filed her EEOC Intake Questionnaire and

accompanying affidavit ("questionnaire") with the EEOC on December 3, 2001, more than 60 days *prior to* initiating this suit on April 30, 2002, and alleged discriminatory acts that occurred within 300 days of the filing of the questionnaire. *See* 29 U.S.C. § 626(d). The relevant question on appeal is whether this otherwise timely filing with the EEOC constituted a "charge." We conclude that Kennedy's questionnaire constituted an EEOC "charge" because (1) its content satisfied the statutory and regulatory requirements for what content must be included in a charge, and (2) the questionnaire communicated Kennedy's intent to activate the EEOC's administrative process.

First, Kennedy's questionnaire satisfies the EEOC's interpreting regulations specifying the required content that must appear in a "charge." *See* 29 C.F.R. §§ 1626.3, 1626.6, 1626.8(b). By stating that FedEx was discriminating against her and others because of their age, Kennedy's questionnaire certainly alleged that the defendant had engaged in "actions in violation of the Act," as is required by 29 C.F.R. § 1626.3. Moreover, the questionnaire form and accompanying four-page verified affidavit, were a "writing" that named the employer and generally described the alleged discriminatory act, as is required by 29 C.F.R. §§ 1626.6 and 1626.8(b). The affidavit detailed numerous instances of alleged discrimination, such as FedEx's implementation of various aspects of the "Best Practices Pays" and "Minimum Acceptable Performance Standards" programs. It also contained much of the content suggested by, but not required by, the regulations. *See* 29 C.F.R. § 1626.8(a). For instance, the questionnaire contained the full contact information for Kennedy and her employer, pertinent dates, the approximate number of employees at her workplace, and indicated that she had not filed any other complaint against this employer. *See* 29 C.F.R. § 1626.8(a)(1)-(5).

Second, the content of the questionnaire evidenced Kennedy's intent to activate the administrative process. The forceful tone and content of the affidavit should have alerted the EEOC that the filing was meant to be an EEOC "charge." For instance, the affidavit states that, in years past, Kennedy has "threatened to stand up for [her] rights" but that "[i]n the past several months" she had "come to realize that by doing nothing" she had allowed FedEx to continue its discriminatory practices against her. As further indication that Kennedy intended to activate the administrative process, by checking the "consent" box on the questionnaire form, Kennedy consented to the disclosure of her identity to the employer that allegedly discriminated against her. This demonstrates Kennedy's desire to move the investigatory and conciliatory process forward. Moreover, the EEOC form, on which Kennedy submitted her affidavit, itself indicated that the case was currently "open," also suggested that her filing would be sufficient to initiate the administrative process. Finally, and perhaps most tellingly, the affidavit unambiguously states, "[p]lease force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created within their application of *Best Practice Pays/High-Velocity Culture Change*." In light of these facts, we conclude that Kennedy provided written notice to the EEOC "that would convince a reasonable person" that Kennedy intended "to activate the Act's machinery," *see Bihler*, 710 F.2d at 99. The EEOC erred by failing to act in response to Kennedy's manifested intent.

FedEx argues that the fact that Kennedy later filled out an actual EEOC charge form indicates that her earlier intention was not to file a "charge." Some courts have followed this logic to some extent. *See Bost*, 372 F.3d at 1241; *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672, 677 (8th Cir.

1996). There is nothing in the record, however, that indicates that Kennedy, by also filing a charge form, was doing anything more than supplementing her earlier charge, or acting out of a surfeit of caution. Therefore, based on the circumstances of this case, we conclude that the content of Kennedy's questionnaire sufficiently demonstrated her intent to activate the administrative process and her later filing of an EEOC charge form does not compel us to find otherwise.

Having established that the questionnaire in this case was a "charge," we turn to the piggybacking plaintiffs' theory that they can use Kennedy's charge to satisfy the ADEA's time limit requirements because Kennedy's affidavit identified discriminatory treatment that is similar to the acts described in the complaint and alleges that a large group of workers have experienced similar discrimination. *See Tolliver*, 918 F.2d at 1056-58. We agree with this theory.

Like the Holowecki complaint, Kennedy's questionnaire described the allegedly discriminatory policies, such as the Best Practices Pays, Minimum Acceptable Performance Standards, and other discriminatory practices, in detail. Kennedy's questionnaire also provided notice that the policies were affecting a wide range of FedEx employees. The affidavit stated, for instance, that the Best Practice Pays policy "has systematically targeted myself and others." **[A. 158]** Moreover, it stated that "management has continually picked at me and other older couriers emotionally and financially by changing our 'start times'" and that Kennedy knew she was "not alone" because "many older couriers" shared her "doubts and fears." Kennedy concluded by stating that FedEx must be forced to stop its discriminatory policies so that "we can finish out our careers" absent discriminatory practices.

Because we agree that the piggybacking plaintiffs can piggyback onto Kennedy's charge, there is no reason for this court to address the two other piggybacking theories presented on appeal. Therefore, we are left only to deal with the two remaining named plaintiffs who individually filed administrative charges with the EEOC.

II. Robertson's EEOC Charge

It is undisputed that Robertson's charge was filed more than 60 days prior to the initiation of the Holowecki suit.[6] The district court held, however, that the Robertson charge was nonetheless untimely under Section 626(d) because it was filed more than 300 days after the implementation of the allegedly discriminatory policies alleged in the complaint. Specifically, the district court found the charge untimely because it was submitted "over six years after plaintiffs claim the policies were implemented." Appellee also challenges the Robertson charge on an additional timeliness ground not specifically addressed in the district court's opinion, arguing that Robertson did not file suit in federal court within 90 days of his receipt of a right-tosue letter, in violation of Section 626(e). We find that, if we accept the allegations in the complaint as true, Robertson's charge was not filed more than 300 days after the implementation of the discriminatory policies alleged, and we therefore vacate the district court's dismissal of his claim on that basis. However, because it was not reached below, we remand for the district court to address whether Robertson's suit was untimely because it was not filed within 90 days of receiving the right-to-sue letter.

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[6] Robertson's charge was filed on January 2, 2001, and the Holowecki suit was filed April 30, 2002.

Robertson's charge unambiguously included references to allegedly discriminatory practices that took place within the 300-day period and did not even mention any particular FedEx policies or acts that were initiated more than 300 days before the filing of the charge. Instead Robertson's January 2, 2001, charge alleged that FedEx refused to allow Robertson to take accrued leave in August 2000, and terminated him on September 8, 2000, based on age and disability discrimination. Both of these acts occurred less than 300 days *before* Robertson filed his January 2, 2001, charge. The district court's reference to alleged discriminatory acts that occurred outside the 300-day period is simply a misreading of the allegations in the complaint. We therefore vacate the district court's dismissal on the basis that Robertson's charge was untimely, and remand for the district court to consider whether Robertson filed suit within 90 days of receiving the right-to-sue letter.

III. McQuillan's EEOC Charge

As with Robertson, we disagree with the district court's determination that McQuillan failed to file within 300 days after the alleged unlawful practice occurred. McQuillan's charge, which was signed on September 11, 1998, challenges his termination from employment, which occurred on March 31, 1998. There is no doubt that the charge described acts that allegedly occurred within the required 300-day period. Because we vacate the district court's dismissal of McQuillan's claim on this ground, we remand for the district court to consider in the first instance appellee's argument that McQuillan's suit was not filed within 90 days of receiving the right-to-sue letter.

CONCLUSION

The judgment of the district court is reversed with respect to all of the named plaintiffs, except Robertson and McQuillan. The district court's dismissal of Robertson's and McQuillan's claims is vacated. The case is remanded for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02-CV-3355

[Filed May 4, 2004]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Trompics, individually and on behalf of all others similarly situated,
Plaintiff,

v.

Federal Express Corporation,
Defendant.

MARGINAL ENTRY ORDER

Motion Denied. So Ordered.

/s/ Judge Lawrence M. McKenna
USDJ 5/4/04

NOTICE OF MOTION AND MOTION TO ALTER OR AMEND THE MEMORANDUM AND ORDER OF OCTOBER 9, 2002

PLEASE TAKE NOTICE THAT plaintiffs, by their attorneys, move under Rule 59(e), Fed. R. Civ. P., for an order modifying and vacating the memorandum and order dated October 9, 2002, granting the defendant's motion to dismiss, and dismissing the Complaint, without leave to file an amended complaint or other pleading.

1. This motion is based upon the decision of the Supreme Court in *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (March 19, 2002), on remand, *Edelman v. Lynchburg College*, 300 F.3d 400 (4th Cir. 2002) and the regulations of the EEOC which define what kind of writing constitutes a charge of discrimination. 20 C.F.R. 1601.12(b)(Title VII reg); and 29 C.F.R. 29 C.F.R. 1626(b)(ADEA regs.).

Under the Supreme Court's decisions in *Edelman v. Lynchburg College, supra* and the lawful regulations of the EEOC, the questionnaire and affidavit of Patricia Kennedy was a charge in December, 2001, when received by the EEOC. Compare, Memo. and Order of Oct. 9, 2002 at pages 8-10. Under the lawful regulations, therefore, she filed her charge more than 60 days before filing of this suit. The ruling of this Court at pages 8-10 is therefore inconsistent with the *Edelman* decision, *supra*, and the valid EEOC regulation and should be vacated or altered.

2. This Court ruled in the Memo. and Order that the charges of Robertson and (perhaps) Kennedy were untimely, because they were not filed within 300 days of the commencement of the alleged unlawful discriminatory practices. Memo. at p. 8. However, the Complaint alleges

that the age discriminatory practices of Federal Express that commenced in 1994, has followed those practices "each year" since that time, and that they "are the prevailing pattern or practice of Federal Express" and that "Federal Express has continued to follow that pattern or practice to the present..." and that "Unless restrained by order of this Court the defendant will continue to pursue ...policies and practices alleged in the Complaint." Paras.23, 24 and 30. Each time an older worker is injured by an age discriminatory practice of Federal Express, that worker suffered a wrong "actionable under" the law "regardless of the fact that this pattern was begun" more than 180 or 300 days before the charge was filed *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986); *National Passenger R. Corp. v. Moragan*, ___ U.S. ___, 122 S. Ct. 2061, 2071 (2002).

3. The Second Circuit has ruled that the opt in procedure applies to actions by individuals as well as to class actions, and that individuals who did not file charges may prosecute another action under the single filing rule, if a charge of a non-party gave notice to EEOC of the employer-wide nature of the allegations. *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1055-1060 (2d Cir. 1990), *cert. den.* 499 U.S. 983. The district court attempted to distinguish that case on the ground that in that case there was a class certification and then a decertification, while in the *Freeman* case (at issue here) there was no class certification. Memo. at pp. 11-12.

However, the language of reasoning of the Second Circuit in *Tolliver, supra*, is incompatible with that distinction, for it expressly recognized that the "opt n" procedures specified in the ADEA are applicable in "individual suits" as well as in class actions, and they permit persons who did not file a charge to bring suit, so long as the EEOC was given notice by an earlier charge. *Tolliver, supra*, 918 F.2d at 1057. The

district court erred in failing to apply the decision in *Tolliver* to the case at bar.

In any event the defendant has the burden on the affirmative defense of the untimeliness of a charge, and plaintiffs should be allowed discovery before any such defense is acted upon by this court.

This motion is based upon the allegations of the Complaint, and the exhibits of record. A memorandum of points and authorities and a proposed Order are submitted herewith.

For the reasons set forth above, and set forth more fully in the memorandum of points and authorities in support of this motion, the motion should be granted, and the Court should enter an order of the kind submitted herewith.

Respectfully submitted,

/s/

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October 23, 2002

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

02 CIVIL 3355(LMM)

[Filed October 23, 2002]

PAUL HOLOWECKI, et.al.,	)
Plaintiff,	)
	)
-against-	)
	)
FEDERAL EXPRESS CORP.,	)
Defendants.	)
	)

JUDGMENT

Defendant having moved to dismiss pursuant to FRCP 12(b)(1) & (6), and the matter having come before the Honorable Lawrence M McKenna, United States District Judge, and the Court, on October 8, 2002, having rendered its Memorandum and Order granting defendant's motion to dismiss plaintiffs' ADEA claims without leave to replead, and declining to exercise jurisdiction over the state law claims, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dated October 8, 2002, defendant's motion to dismiss

plaintiffs' ADEA claims is hereby granted without leave to replead and the Court declines to exercise jurisdiction over the state law claims.

DATED: NYC, NY
October 23, 2002

JAMES M. PARKISON

Clerk of Court

BY:

/s/ James M. Parkison
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

02 Civ. 3355(LMM)

[Filed October 9, 2002]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Trompics, individually and on behalf of others similarly situated,
Plaintiff,

v.

FEDERAL EXPRESS CORPORATION,
Defendant.

JUDGES: Lawrence M. McKenna, U.S.D.J.

MEMORANDUM AND ORDER

McKENNA, D.J.

Plaintiffs Paul Holowecki, et al. ("plaintiffs")[1] bring this action against their employer or former employer, defendant Federal Express Corporation ("Federal Express"), alleging age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA"), the New York Human Rights Law ("NYHRL"), and the laws of California, Florida, Illinois, Michigan, and New Jersey. Federal Express moves to dismiss the complaint, which was filed on April 30, 2002, under Federal Rules of Civil Procedure 12(b)(1)("Rule 12(b)(1)") and 12(b)(6) ("Rule 12(b)(6)") on the grounds that plaintiffs' claims are time-barred under 29 U.S.C. § 626(d). For the reasons set forth below, the Court grants the motion.

BACKGROUND

Plaintiffs, who are at least 40 years of age, are or were employed by Federal Express as couriers. (Compl. ¶ 6.) They bring this suit on behalf of themselves and others similarly situated. (*Id.*)

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[1] In the complaint, plaintiff Nancy Trompics's name is misspelled as Nancy Thompics. Plaintiffs subsequently corrected the caption in their opposition to defendant's motion to dismiss. Federal Express now argues that plaintiffs violated Federal Rule of Civil Procedure 15 by not requesting leave of the court before amending the caption. The Court treats plaintiffs' correction of the caption as a request to amend and finds the requirements of Rule 15 satisfied. *See* Fed. R. Civ. P 15(a) ("leave [to amend] shall be freely given when justice so requires."); *Arfons v. E.I. Du Pont De Nemours & Co.*, 261 F.2d 434, 435 (2d Cir. 1958) ("It is now well established that dismissals for mere technical defects or ambiguities in pleadings are not favored.").

Federal Express is a corporation engaged in the transportation of packages by air and ground throughout the United States and elsewhere. (*Id.* ¶ 3.) Federal Express is an employer within the definition and coverage of 29 U.S.C. § 630(b) of the ADEA, the New York Human Rights law, and other state laws prohibiting age discrimination. (*Id.* ¶ 5.)

Prior to this action, two of the plaintiffs, Kevin McQuillan ("McQuillan") and George Robertson ("Robertson") filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (Morrison Decl. ¶¶ 5-7.) McQuillan filed a charge with the EEOC alleging age discrimination on September 11, 1998. (*Id.*, Ex. 3.) The EEOC found no cause to believe discrimination had occurred and issued a notice of right to sue on June 11, 1999. (*Id.*) Robertson filed a charge with the EEOC alleging age and disability discrimination on December 1, 2000. (*Id.*, Ex. 4.) The EEOC dismissed the charge and issued a notice of right to sue on April 25, 2001. (*Id.*) In addition, on December 3, 2001, plaintiff Patricia Kennedy ("Kennedy") filed a questionnaire and affidavit with the EEOC on behalf of herself and others alleging age discrimination by Federal Express. (Pl.'s Ex. 6.) She formally filed a charge of discrimination with the EEOC on May 30, 2002, one month after the current action was commenced. (Pl.'s Ex. 7.) Federal Express has no record of charges of discrimination being filed by any of the other named plaintiffs. (Morrison Decl. ¶ 7.)

Plaintiffs allege in the current action that since 1994, when Federal Express adopted certain practices and procedures, and each year thereafter, Federal Express has followed a pattern or practice of employment procedures that discriminate because of age against plaintiffs and other similarly situated

experienced couriers who are over 40 years old. (Compl. ¶¶ 12, 23.)

Federal Express moves to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) on the grounds that plaintiffs failed to file a charge of discrimination with the EEOC prior to bringing the current lawsuit. Plaintiffs oppose the motion, stating that even though 11 plaintiffs in this case did not file charges with the EEOC, the single filing rule allows them to "piggyback" their claims onto the charges filed by either Jack Haneline II ("Haneline") or those filed by the plaintiffs in *Freeman et al. v. Federal Express*, No. 99-2466 (M.D.Fl. Sept. 25, 2000), *aff'd*, 2002 U.S. App. LEXIS 5816, 2002 WL 187185 (11th Cir. 2002) ("*Freeman*"). Neither Haneline nor the *Freeman* plaintiffs are plaintiffs in the current action. These charges are described briefly below.

A. The Haneline Charge

In May 1995, Haneline filed a charge with the EEOC, alleging that he was personally discriminated against under Title VII and the ADEA. (Compl. ¶ 29; Morrison Decl., Ex. 5.) The EEOC dismissed this charge in June 1996, but Haneline never filed suit. (Morrison Decl., Ex. 5.)

B. Charges filed by Plaintiffs in *Freeman et al. v. Federal Express*

Between 1996 and 1998, six Federal Express employees filed charges with the EEOC, alleging that they were personally subject to age discrimination. (Morrison Decl., Ex. 8.) These charges were dismissed. (*Id.*) Subsequently, on October 26, 1999, these employees brought an action in federal court alleging age discrimination. (Pl.'s Ex. 3.) No class was ever certified in the *Freeman* litigation, and the case

was dismissed without prejudice by the district court on September 25, 2000. (Morrison Decl. ¶¶ 11-12, Ex. 9.)

Some of the plaintiffs in this case attempted to join the *Freeman* suit in March 2001 by listing themselves as parties in a proposed amended complaint that the *Freeman* plaintiffs sought to file with the District Court on March 6, 2001. (Morrison Decl. ¶13, Ex. 10.) No order was ever issued granting the *Freeman* plaintiffs leave to amend, or allowing the plaintiffs in this action to join the *Freeman* litigation. (Morrison Decl. ¶ 13.)

STANDARD OF REVIEW

When deciding a motion to dismiss, the court must "assum[e] the truth of all factual allegations contained in the complaint and draw[] all inferences in the plaintiff's favor." *Boyd v. Nationwide Mut. Ins. Co.*, 208 F.3d 406, 409 (2d Cir. 2000); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993). Normally the court must limit itself "to a consideration of the facts that appear on the face of the complaint." *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir. 1984). However, in resolving a motion to dismiss under Rule 12(b)(1), a district court may refer to evidence outside the pleadings. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). In addition, if a defendant's motion to dismiss is for failure to state a claim, the court can consider any documents attached to the complaint as exhibits or incorporated into the complaint by reference. *Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 662 (2d Cir. 1996). In such cases, the court may also consider any documents upon which a plaintiff "solely relies" and which are "integral" to its claims. *Int'l Audiotext Network, Inc. v. AT&T*, 62 F.3d 69, 72 (2d Cir. 1995); *see also Cortec*

Indus., Inc. v. Sum Holding L.P., 949 F.2d 42 (2d Cir. 1991).

DISCUSSION

A. Section 626(d) of the ADEA

Section 626(d) of the ADEA provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed-
>
> > (1) within 180 days after the alleged unlawful practice occurred; or
> > (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

29 U.S.C. § 626(d).

Because New York "has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such

discriminatory practice," an individual alleging age discrimination occurring in this state has 300 days after the alleged unlawful activity to file a charge with the EEOC. 29 U.S.C. § 633(b).[2] An ADEA action may be commenced in federal court: (i) as early as sixty days after filing a charge of discrimination with the EEOC, or (ii) as late as ninety days after receiving an EEOC right-to-sue notice. *See id.* § 626 (d), (e); *Vollinger v. Merrill Lynch & Co., Inc.*, 198 F. Supp. 2d 433, 439 (S.D.N.Y. 2002).

An exception to the ADEA's time limitations is the single filing rule. "The single filing rule provides that where one plaintiff has filed a timely charge of discrimination with the appropriate administrative agency, other non-filing plaintiffs may join in a later action in federal court if their individual claims arise out of similar discriminatory treatment in the same time frame." *Levy v. United States Gen. Accounting Office*, 1998 U.S. Dist. LEXIS 5567, No. 97 Civ. 4016, 97 Civ. 4488, 1998 WL 193191, at *2 (S.D.N.Y. Apr. 22, 1998), *aff'd*, 175 F.3d 254 (2d Cir. 1999); *see Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2d Cir. 1986). In *Tolliver v. Xerox Corp.*, the Second Circuit held that in addition to allowing non-filing plaintiffs to opt into an existing action, the single filing rule allowed non-filing plaintiffs to file their own individual actions when they had attempted to opt into a class action brought by filing plaintiffs, but the class had later been decertified. 918 F.2d 1052 (2d Cir. 1990). The filing

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[2] The Court notes that the laws of the other states under which plaintiff brings suit also have provisions prohibiting age discrimination. *See* Cal. Gov't Code § 12900 *et seq.* (California); Fla. Stat. Ann. § 112.043 -.044, § 760.01 (Florida); Ill. Comp. Stat. Ann. Ch. 775, act 5/1-101 *et seq.* (Illinois); Mich. Comp. Laws Ann. § 37.2102 *et seq.* (Michigan); N.J. Stat. Ann. §§ 10:3-1, 10:5-1 (New Jersey).

plaintiff's charge, however, must have contained "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim." *Id.* at 1058. "Such a claim alerts the EEOC that more is alleged than an isolated act of discrimination and affords sufficient notice to the employer to explore conciliation with the affected group." *Id.* "The rationale for this rule is to avoid needless repetition in the filing of administrative charges when the initial claim was sufficient to put the employer on notice of the alleged violations and afford the employer an opportunity for conciliation with the aggrieved employees." *Levy*, 1998 U.S. Dist. LEXIS 5567, 1998 WL 193191, at *2.

B. ADEA Claims of McQuillan and Robertson

McQuillan and Robertson did file charges with the EEOC before bringing this suit. However, these filings were untimely. McQuillan filed his charge with the EEOC on September 11, 1998, nearly four years after the implementation of the policies challenged in this lawsuit. (Morrison Decl., Ex. 3.) Robertson filed his EEOC charge on December 1, 2000, over six years after plaintiffs claim the policies were implemented. (*Id.*, Ex. 4.) Since McQuillan and Robertson did not file their EEOC charges within 300 days of the alleged unlawful practice, as is required by the ADEA, their claims are time-barred.

C. Kennedy's ADEA Claim

Kennedy filed an administrative charge on May 30, 2002, one month after the complaint in this case was filed. (Pl.'s Ex. 7.) Therefore, she has failed to meet the requirement of Section 626(d) that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge

alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." 29 U.S.C. § 626(d). Kennedy argues that her filing of a questionnaire and affidavit with the EEOC in December 2001 satisfies the charge requirement. (Pl.'s Ex. 6.) If that were true, Kennedy's claim in this action would be timely since more than 60 days would have passed since she filed her EEOC charge. However, the Court rejects this argument.

Section 626(d) specifically requires that a "charge" be filed with the EEOC prior to commencing a civil action. 29 U.S.C. § 626(d). If Congress had intended that an intake questionnaire or affidavit constituted sufficient notice to the EEOC of alleged discrimination, it could have specifically stated so, but it did not. While it is true that on occasion, courts have found that an intake questionnaire constitutes a formal charge, *see, e.g., Angotti v. Kenyon & Kenyon*, 929 F. Supp. 651 (S.D.N.Y. 1996); *O'Connor v. Pan Am*, 1990 U.S. Dist. LEXIS 5403, No. 88 Civ. 5962, 1990 WL 118286 (S.D.N.Y. May 4, 1990); *Halas v. Ford Motor Co.*, 987 F. Supp. 227 (W.D.N.Y. 1997), these cases involved situations where the plaintiff had been led by the EEOC to believe that the questionnaire alone constituted sufficient notice to the EEOC of the alleged discrimination. Such is not the case here. Therefore, the Court finds that Kennedy's questionnaire and affidavit should not be considered the equivalent of a charge, and that her charge, dated May 30, 2002, was untimely since it was filed one month after the current action was commenced.

D. ADEA Claims of the other 11 Plaintiffs

The other 11 plaintiffs never filed charges with the EEOC. However, they argue that they are covered by the single filing rule, which in limited circumstances, permits a party who has

not filed an administrative charge to participate in a lawsuit by piggybacking on the administrative charge of another party who has properly commenced suit. These plaintiffs attempt to "piggyback" on either the actions brought by Haneline or the plaintiffs in *Freeman*. However, the Court finds that neither charge allows plaintiffs to take advantage of the single filing rule.

1. The Haneline Charge

While Haneline filed a charge, this charge alleged that he was being discriminated against personally. (Morrison Decl., Ex. 5.) It failed to give the EEOC "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim." *Tolliver*, 918 F.2d at 1058. Therefore, the plaintiffs in this action are unable to bring this suit based on Haneline's charge.[3]

2. The *Freeman* charges

Similarly, none of the charges filed by the *Freeman* plaintiffs gave any indication that the grievance affected a group of individuals. (Morrison Decl., Ex. 8.) Therefore, the plaintiffs may not piggyback off of these charges. As discussed above, the Court also rejects plaintiffs' argument that because their questionnaires and affidavits alleged group

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[3] Moreover, while Haneline received a notice of right to sue in June 1996, he never commenced a lawsuit. As the Fifth Circuit has recently noted, "no circuit has ever authorized piggybacking on an EEOC charge when the individual who filed the charge never actually filed suit." *Bettcher v. Brown Schools, Inc.*, 262 F.3d 492, 495 (5th Cir. 2001).

discrimination, the single filing rule is applicable. As the Seventh Circuit has stated:

> [I]t is the charge rather than the questionnaire that matters. Only the charge is sent to the employer, and therefore only the charge can affect the process of conciliation. What is more, the charge is not the work of a faceless bureaucrat, leaving victims of discrimination helpless to protect themselves. Complainants are free to draft and file charges on their own, or hire attorneys to do so, and a charge drafted by the EEOC's staff is not filed unless the complainant signs it ... If she had been dissatisfied with the staff's understanding of her answers, all she had to do was point this out and ask for an addition.

Novitsky v. Am. Consulting Eng'rs, L.L.C., 196 F.3d 699, 702 (7th Cir. 1999).

The Court also notes that *Freeman* is distinguishable from *Tolliver*, in which the single filing rule was held to be applicable. In *Tolliver*, 18 employees who had not filed administrative charges opted into an existing ADEA class action, in which plaintiffs had filed valid administrative charges. 918 F.2d at 1055. The class, however, was later decertified. The Second Circuit allowed the non-filing employees to then bring individual actions by piggybacking on the charges of the filing plaintiffs, despite the class decertification. *Id.* at 1057.

Unlike *Tolliver*, however, the district court never certified a class in *Freeman*. (Morrison Decl. ¶¶ 11-12, Ex. 9.) In addition, the plaintiffs in this action attempted to become part of the Freeman action only after it had been dismissed. (Morrison Decl. ¶ 13, Ex. 10.) The Court declines to extend

the single filing rule to a case containing such procedural differences. *See Bliss v. Rochester City Sch. Dist.*, 196 F. Supp. 2d 314, 323 (W.D.N.Y. 2002) ("[P]laintiff also argues that she was not required to file any charge at all because she considers herself to be a member of a class action in the *Seils* case, and she attempts to 'piggyback' on the charges filed in that case ... [T]his argument fails because no class was ever certified in the *Seils* case").

D. Plaintiffs' State Law Claims

Because plaintiffs' federal claims under the ADEA are dismissed, and plaintiffs are not asserting subject matter jurisdiction under 28 U.S.C. § 1332, the Court declines to retain jurisdiction over plaintiffs' state claims. *See Rocco v. New York State Teamster's Conference Pension and Ret. Fund*, 281 F.3d 62, 72 (2d Cir. 2002).

CONCLUSION

For the foregoing reasons, the Court grants Federal Express's motion to dismiss plaintiffs' ADEA claims, without leave to replead. Because the Court dismisses plaintiffs' federal claims, it declines to exercise jurisdiction over plaintiffs' state law claims. Complaint dismissed.

Dated: October 8, 2002

New York, New York

SO ORDERED.

/s/
Lawrence M. McKenna
U.S.D.J.

APPENDIX F

INTAKE QUESTIONNAIRE

[see fold out exhibit on following page]

INTAKE QUESTIONNAIRE A-157

If form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

EEOC USE ONLY
Name (Intake Officer)

Please answer the following questions, telling us briefly why you have been discriminated against in employment. An officer of the EEOC will talk with you after you complete this form.

DOB: [redacted]59 (Please print) SSN: [redacted]

NAME: PATRICIA ANN KENNEDY Date: 12-3-01
(First) (Middle Name or Initial) (Last)

ADDRESS: 7042 MAIDSTONE CT Phone No. (include area code): 727-376-7042

CITY: NEW PORT RICHEY STATE FL ZIP CODE 34653

Please provide the name of an individual at a different address who is in the local area and who would know how to reach you.

NAME: IRENE LEHR RELATIONSHIP: MOTHER TELEPHONE: 727-372-8039

ADDRESS: 8039 OLD CR 54 CITY NEW PORT RICHEY STATE FL ZIP CODE 34653

Why do you believe this action was taken against you? (e.g., Race, Color, Religion, Sex, Age, Disability, or National Origin.)

AGE DISCRIMINATION

What action was taken against you that you believe to be discrimination? What harm, if any, was caused to you or others in your work situation as a result of that action? (e.g., Discharge, Discipline, or Harassment) (If more space is required, use reverse.)

Over the past several years Management has treated me and Others differently on virtually every facit of my job, including but not limited to staffing time; (OVER)

I believe I was discriminated against by: (Check those that apply)

☒ EMPLOYER ☐ UNION (Give Local No.) ☐ EMPLOYMENT AGENCY ☐ OTHER (Specify)

NAME: FEDERAL EXPRESS CORP.
ADDRESS: 1881 MAIN ST DUNEDIN FL 34698
PHONE: 727-736-6727

NAME:
ADDRESS:
PHONE:

Approximate number employed by this employer: 100

What was the most recent date the harm you alleged took place? 12-3-01 AND CONTINUING

Are you now employed by the employer that you believe discriminated against you? YES

IF YES:
HIRED: 8-17-87 (Date)
CURRENT POSITION: COURIER

IF NO:
APPLIED FOR (Position)
ON (Date)

OR:
WAS EMPLOYED AS (Position)
UNTIL (DATE)
I WAS (Laid off, Fired, etc.)

Finally, your identity will be disclosed to the organization which allegedly discriminated against you. Do you ☒ Consent or ☐ not consent to such disclosure?

Have you sought assistance about the action you think was discriminatory from any Government agency, from your union, an attorney, or from any other source? ☒ NO ☐ YES (If answer is yes, complete below.)

NAME OF SOURCE OF ASSISTANCE: DATE:

RESULTS, IF ANY: N/A

Have you filed an EEOC charge in the past? ☒ NO ☐ YES (If answer is yes, complete below.)

APPROX. DATE FILED:	ORGANIZATION CHARGED:	CHARGE NUMBER (If known):

SIGNATURE Patricia A. Kennedy DATE 12-3-01

Form 283 Patricia A. Kennedy 2-3-02

BEST AVAILABLE COPY

STATE OF FLORIDA CASE NAME _____

CITY/COUNTY OF Dunedin/Pinellas CASE NO. _____

AFFIDAVIT

I, Patricia A. Kennedy, being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 42 years of age, my gender is female and my racial identity is Caucasian.
My date of birth is [REDACTED]/59. My Social Security number is [REDACTED].
I reside at 7042 Maidstone Court.
City of New Port Richey. County of Pasco.
State of Florida. Zip Code 34653.
My telephone number is (including area code) 727-376-7042.

My complaint is against Federal Express Corporation which is located at 1881 Main Street in Dunedin Florida 34698.
Its telephone number is (including area code) 727-736-6727.
My job classification is (if applicable) Courier. My wage is $17.39.
My Immediate supervisor is (if applicable) Chris Savas Operations Manager.

Patricia A. Kennedy's EEOC Affidavit

Since I was hired by FedEx in 1987, I have given 100% to my job which I am proud of. During the first eight years of my career at FedEx, my performance reviews and bonus pay-outs continually reaffirmed my dedication to my customers and my employer. However, over the last several years I feel that FedEx through the "Best Practice Pays" Program has systematically targeted myself and others thereby making it more difficult for me to confirm that work ethic via their contorted measuring stick, *minimum acceptable performance standards or MAPS*. I feel that FedEx management and their "industrial engineers" have and still are discriminating against me because of my age. I believe my employer's actions violate my civil rights.

Application of B.P.P. Absenteeism Policy Violates ADEA and ADA:

Even before I turned 40 I felt I was being treated differently because of my age – ability to heal faster and my pre-1988 hiring date. In October of 1995, Federal Express via BPP instituted a 30 day/90 day Route or Job Retention policy for medical absenteeism which had in place "certain criteria" upon which a panel of non-medical ex-operation management people could determine who loses their route for injuries (around 30 days of more) and who loses their station full time slot for injuries (around 90 days or more). In January, 1996, Best Practice Pays declared the need for a new absenteeism policy which could for the first time negatively impact on-the-job injuries and which could lead to discipline up to and including termination. And this policy obviously impacted older, slower to heal workers *plus*, it was absolutely applied in a discriminatory manner. This in 1997 I *became* displaced from the CLW station due to an on-the-job injury, a younger,

post-1988 employee was promoted to full time and took my route and full time slot. But from this displacement I was lucky to find a full time slot open in East Tampa at the MCF station (a much longer commute) and I also learned their older employees were being subjected to the same hostile work environment games as my fellow co-workers at the Dunedin CLW station. It should be noted that my new MCF co-workers were bolder and filed many more EEOC age discrimination affidavits; their inability to grasp how and why they were being treated differently lead most of them to frustration and fear of reprisal. I know of several older couriers who were fired and/or constructively terminated as a result of these BPP policy and procedure changes. I don't know of a single younger employee who lost their job because of such policies. Such policies and procedures and management's ability to determine *"fault"* for accidents occurring in the work place further heightens my frustrations and fears. I don't want to give in to their desire to have me walk away from this job but I often question the pros and cons of whether or not it would be better to walk away versus being fired by a "good" company to work for.

Application of BPP Employee Reviewing Standards and Methods Violates ADEA:

Every year my employer's Survey Feedback Action or SFA promises so long as I do a good job, I'll always have a job! Notwithstanding what FedEx has done with its treatment of on-the-job injuries (many of which are repetitive motion injuries which you get by doing a good job), my company has through its BPP program completely polluted the methods of calculating and defining what is a "good job" to the point that older employees like myself no longer know if we even will have a job tomorrow. In other words, what was once

considered a good enough performance to get a bonus is now borderline for *job retention*.

And these ever-changing BPP *minimum acceptable performance states (MAPS)* ARE NOT being applied to the younger couriers or there would be many more terminations and/or employees walking away from their jobs amount this group of younger employees. And this is just one area where the hostile work environment works upon us older employees – where operation managers and industrial engineers keep turning up our numbers trying to pressure us to leave or be terminated while the younger couriers are not being held to the same standards. And as a result of such discrimination, younger couriers stand ready to reap the benefits of another full time slot becoming open.

When BPP was originally introduced in November, 1994 you and your manager were supposed to go out on the road and then sit down and arrive at mutually agreeable productivity goals. And for the first few years, management would attempt to make it appear that they were following this course. However, from time to time management would single out older couriers and try to get them to sign off on unrealistic goals via high pressure and deceit. In the mean time, Memphis has discovered many ways to raise your numbers without our approval by changing the way our productivity is calculated (i.e. adding the time in your delivery cycle for going to and from your route so that any time spent driving in excess of the time allotted would further dilute your productivity efficiency). And although these subversions may appear to be applied to all couriers equally (don't know how generous management is being in calculating their driving time), the fear of accountability remains highest among us older couriers. Also, when management check rides an older courier, they make sure that they increase your stops

per hour goal so that you are lucky to be at a 4 for your review. To make matters worse, my manager is now raising my numbers *at will* because he says Memphis believes our goals should be established by each persons' highest daily productivity for any three days during the previous six weeks. Thus, everyone will be always **UNDER** Memphis' *minimum acceptable performance standards* (MAPS 4 rating) except for those three days for every six week period. Which means we are subject to be terminated on any given day even though in all reality I'm working the best I always have and should be obtaining the highest score, a 7 and bonus. Such an atmosphere invites discriminatory discipline and further increases our hostile work environment.

On or about July 9, 1996 my perception of where and how management had pigeonholed myself and other older couriers within their BPP age discrimination plan became very clear. Our start times were pushed up another 10 minutes per day, but management also found another means to try and portray each one of us as malcontents, slough-offs (i.e. by only permitting us to be in a code 53 and forbidding us the use of the "general package handling, code 30" - while still continuing to hold us accountable for leaving the building after a maximum of 9 minutes of fine sort, code 53 – management knew such 9 minutes would expire every day before the sort was even done, therefore, we would be in code 53 at least twice as long as other couriers and on paper it would appear as though we were dragging our feet by not leaving the building promptly). Then about 5 ½ years later, I received a copy of a letter dated January 30, 2001 which is addressed to the older couriers under operations manager Lou Fusco regarding Code 53 and that after our stretch/flex and pre-trip to please go into a Code 53 (See Exhibit "1"). Management's attempt to revive this earlier discriminatory practice which places older couriers in a bad light and has

further financial impacts upon each of us was still another driving force in filing this complaint. The laws against age discrimination are there to prevent employers from purposely placing older employees in a false light in order to pressure them into quitting and/or being terminated under false or misleading circumstances.

Since the Spring of 1995, management has continually picked at me and other older couriers emotionally and financially by changing our "start times". I feel the initial changes in start times were the direct result of Memphis' discriminatory training program contained in "High-Velocity Culture Change, A Handbook For Managers". As a result of such implementations, younger couriers with less seniority than me have been getting earlier start times so that they are able to take out just as many stops as I do and get more hours than I do. It's not fair! Younger couriers are starting earlier, getting their trucks and packages organized and ready to get on the road when I am just getting to my truck – seeing my packages thrown inside and outside the truck, and then getting pressured by management to leave the building earlier. Management knows it is holding me and others to a higher standard. When I have a day off, management schedules these people to earlier start times, they leave the station better organized with only 80% of my normal route and when I return to work, management throws it in my face that my replacement gets back to the station more quickly than I do. That's one more thing that makes me feel like quitting and finding another job – I know that's how they are trying to force me out. It's hard to continue to do a good job in the hostile work environment that management has created.

Before Best Practice Pays/High-Velocity Culture Change, older couriers always had the earliest start times – it was the easiest money we make in any given day, less time pressure

and better chance to organize your packages to ensure a smoother day. The early start time was one of three reasons us older couriers would bid (by seniority) on a new or open route (better chance for overtime; better organized routing for less mistakes; and better productivity for bigger bonuses). And together these three reasons translate into a larger monthly retirement check down the road. In March of 2000 I signed an offer letter for a route that has always started at 0650A.M. The offer letter that I was given and signed had a start time of 0700AM, which 10 minute difference really irked me, however, a couple weeks later after repeatedly asking management what day I was to start this route, I was then told my start time would be 0730AM – which was not the specific time stated in offer letter that I signed. When I asked management why I was not asked or assigned to start earlier, I was then told that such extra AM hours were being assigned only to PMers that signed up for extra hours. I then saw PMers that signed up for extra hours working 12 hour days. Management always has a couple different flimsy excuses for discriminating against me, but such obvious discrimination is very upsetting and is meant to drive us away.

My employer has a number of other ways to harass older couriers with alleged errors and missing scan data (they admit to faulty equipment/software – but still want to hold us accountable). Along those lines, recently management has been harassing me about "late" package deliveries. I feel that FedEx has manufactured RDL (right day lates) to show a bad performance on my review. I know I didn't have them and they know other younger couriers have late deliveries almost daily and nothing is said. Management's purpose is clear; they want us to see the disparaging treatment and become so disgusted we quit.

For years I have threatened to quit, threatened to stand up for my rights, but was too afraid to do anything. In the past several months, I have come to realize that by doing nothing I have allowed them to build a stronger case against me with their phony *minimum acceptable performance standards*, their faulty electronic data capturing systems and the other discriminatory BPP policies and procedures. I know I am not alone and many older couriers share my doubts and fears regarding being terminated or forced to retire via management's twisted facts and numbers. We have done a good job. Federal Express does not want us pre-1988 senior employees to continue our employment lest they will have to pay for our retirement health benefits if we can complete 10 continuous years of service between ages 45 and 55. Please force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created within their application of *Best Practice/High-Velocity Culture Change*.

I have read and had an opportunity to correct this Affidavit and Exhibit "1" that together consist of 5 typed pages and swear that these facts are true to the best of my knowledge and belief.

/s/ Patricia A. Kennedy

Before me, the undersigned authority personally appeared Patricia A. Kennedy, who being duly sworn says under oath that the matters and facts set out in the above document, consisting of 6 pages, true and correct to the best of her belief.

Sworn to before me, this 3rd day of November, 2001 by Patricia A. Kennedy who has produced FLORIDA DRIVERS LICENSE as identification.

My Commission expires: /s/ Audrey Mary Maccia (Notary Public)

[stamped seal Audrey Mary Maccia
My commission CC791548
Expires November, 17, 2002]

APPENDIX G

BOST INTAKE QUESTIONNAIRE

[Fold out exhibit see next page]

INTAKE QUESTIONNAIRE

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

EEOC USE ONLY
Name (Intake Officer)

Please answer the following questions, telling us briefly why you have been discriminated against in employment. An officer of the EEOC will talk with you after you complete this form.

DOB: [redacted]/55 (Please print) SSN: [redacted]

NAME: ANTHONY WAYNE BOST Date: 12/18/01
(First) (Middle Name or Initial) (Last)

ADDRESS: 6727 Gloria Blvd Phone No. (include area code): (813) 855-9346

CITY: TAMPA STATE FLA ZIP CODE 33615

Please provide the name of an individual at a different address who is in the local area and who would know how to reach you.

NAME: JEAN D. BOST RELATIONSHIP: MOTHER TELEPHONE: (813) 237 4469

ADDRESS: 4602 VIRGINIA AVE CITY TAMPA STATE FL ZIP CODE 33617

Why do you believe this action was taken against you? (e.g., Race, Color, Religion, Sex, Age, Disability, or National Origin.)

AGE DISCRIMINATION

What action was taken against you that you believe to be discrimination? What harm, if any, was caused to you or others in your work situation as a result of that action? (e.g., Discharge, Discipline, or Harassment) (If more space is required, use reverse.)

FEDERAL EXPRESS VIA BEST PRACTICES PLAYS TARGETED MYSELF AND OTHERS BY ABUSE OF POLICY SCRUTINIZING OUR PRODUCTIVITY AND STRICT TIMES AND MADE UNREASONABLE PERFORMANCE DEMANDS AND THREATS OF ADDITIONAL COUNSEL DISCIPLINARY ACTION WHERE YOURSELF

I believe I was discriminated against by: (Check those that apply)

☒ EMPLOYER ☐ UNION (Give Local No.) ☐ EMPLOYMENT AGENCY ☐ OTHER (Specify)

NAME: FEDERAL EXPRESS	NAME:
ADDRESS: 1681 MAIN ST	ADDRESS:
PHONE: (727) 736-6727	PHONE:
Approximate number employed by this employer: 100+	What was the most recent date the harm you alleged took place? CONTINUING ABOUT 9/01 AND CONTINUING

Are you now employed by the employer that you believe discriminated against you? YES

YES:	NO:	OR:
FROM: 10/29/84 (Date)	APPLIED FOR _____ (Position)	WAS EMPLOYED AS _____ (Position)
CURRENT POSITION: COURIER	ON _____ (Date)	UNTIL (DATE) _____ I WAS _____ (Laid off, Fired, etc.)

Normally, your identity will be disclosed to the organization which allegedly discriminated against you. Do you ☒ Consent or ☐ not consent to such disclosure?

Have you sought assistance about the action you think was discriminatory from any Government agency, from your union, an attorney, or from any other source? ☐ NO ☒ YES (If answer is yes, complete below.)

NAME OF SOURCE OF ASSISTANCE: DAVID ROSE/ATTORNEY DATE: 12/18/01

RESULTS, IF ANY:

Have you filed an EEOC charge in the past? ☒ NO ☐ YES (If answer is yes, complete below.)

APPROX. DATE FILED:	ORGANIZATION CHARGED:	CHARGE NUMBER (If known):

SIGNATURE Anthony Bost DATE 12/18/01

COWORKERS ARE NOT EVEN AWARE OF SUCH STANDARDS. THEIR CONTINUING ACTIONS HAVE COST ME THOUSANDS OF DOLLARS AND INTENSE EMOTIONAL DISTRESS VIA THEIR HOSTILE WORK ENVIRONMENT.

PRIVACY ACT STATEMENT

(This form is covered by the Privacy Act of 1974; Public Law 93-579. Authority for requesting the personal data and the uses thereof are given below.)

1. *FORM NUMBER/TITLE/DATE. EEOC FORM 283, Intake Questionnaire, August 1987.*

2. *AUTHORITY. 42 U.S.C. § 2000e-5b, 29 U.S.C. § 211, 29 U.S.C. § 626.*

3. *PRINCIPAL PURPOSE. The purpose of this questionnaire is to solicit information to enable the Commission to avoid the intake of matters not within its jurisdiction.*

4. *ROUTINE USES. Information provided on this form will be used by Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over potential charges, complaints or allegations of employment discrimination and to provide such pre-charge filing counseling as is appropriate. Information provided on this form may be disclosed to other State, local and federal agencies as may be appropriate or necessary to carrying out the Commission's functions. This would include employment practices laws. Information may also be disclosed to charging parties in consideration of or in connection with litigation.*

5. *WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION. The providing of this information is voluntary but the failure to do so may hamper the Commission's investigation of a charge of discrimination. It is not mandatory that this form be used to provide the requested information.*

STATE OF FLORIDA CASE NAME _____

CITY/COUNTY OF Dunedin/Pinellas CASE NO. _____

AFFIDAVIT

I, Anthony W. Bost, being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 46 years of age, my gender is male and my racial identity is Caucasian.
My date of birth was [REDACTED]/55. My Social Security Number is [REDACTED].
I reside at 6723 Grand Bahama Drive. City of Tampa. County of Hillsbourgh. State of Florida. Zip Code 33615.
My telephone number is (including area code) 813-855-9340.

My complaint is against Federal Express Corporation which is located at 1881 Main Street, in Dunedin, Florida 34698.
Its telephone number is (including area code) 727-736-6727.
My job classification is (if applicable) Courier. My wage is $17.39. My immediate supervisor is (if applicable) Chris Savas, Operations Manager.

For more than five years I have tried to convince myself that if I don't strongly object to their age discrimination policies maybe Federal Express will lose interest in their pursuit of me and things will return to the way they were. But local management via Memphis' "industrial engineers" have relentlessly and discriminately attacked my work ethic and pocket book via changes in work schedules, job functions and performance reviewing policies designed to project myself and others similarly situated out as poorly performing employees who are not worthy of job retention. The names and faces of management have changed many times, but Federal Express' planned hostile work environment has continued targeting older couriers via disparaging applications of policies and procedures designed to frustrated us older employees to retire early or be pushed into unsafe or unacceptable acts which would result in career ending injuries, insubordination and/or other disciplinary charges leading up to termination.

I Was A *Best Practice Pays "Target"* Then and Now:

In the early days of "Best Practice Pays" November 1994 to July 1996, I could see the company was rapidly changing the way it was dealing with "older employees", but I did not consider myself one of them. But throughout this period I began to realized management did consider me one of them. However, even before I would allow myself to think about "being" more closely scrutinized by management, I could really see the other older couriers being impacted by big and small corporate changes being glorified under the banner of "Best Practices Pays", an alleged extra compensation package for us couriers. Yes, I did start receiving the same performance reminders about missing electronic scans, proof of delivery, late deliveries, etc. just like the older employees. And I also received the same unwarranted productivity

increases and was segregated with older couriers regarding special assignments during late aircraft delays etc. But I still wanted to believe my job was safer if I could turn the other cheek and ignore what was happening to me. Every time I would look at the station work schedule the reality of my situation would dig into my inner soul - younger couriers were getting the earliest start times, the easy money. And every morning when I go down to my truck, I see the younger couriers' trucks all routed out (due to their earlier start time) and then I look at my packages thrown all around - and I do a slow burn. And if I am really unlucky, my senior station manager or operation manager position themselves on top of me and inquire why I am the last one out of the building. Management knows I'm the last one to get to my truck; then they throw the spotlight on me inside the hostile work environment they created. It is all I can do to face the public with a positive attitude after such a beginning. Moreover, by not fighting each time management wanted to bump my minimum acceptable performance stops pe hour goals via checkrides, my semi-annual performance reviews and therefore, bonus incentives were greatly reduced by their discriminatory BPP program. And now I'm stuck with those artificially inflated numbers and such subsequent manipulations (i.e. adding stem time to and from you route into your on-road productivity hours to tweak your goals even higher) further burden me mentally and financially.

But such was the overall objective of Best Practice Pays/High-Velocity Culture Change. My company's discriminatory plan, BPP, was designed to decrease our desire to come to work by creating a hostile work environment while reducing our pay check via later start times, re-distributing the easy parts of our routes to younger couriers via "super looping" and permanent P-2 drop zones and then further attacking our work ethic (productivity) via unjustified

increases in our stops per hour via intimidation and more recently, by including non-delivery stem time and demanding more sales leads in the productivity work cycle, while at the same time forcing us to make more pick ups which are not counted toward our delivery cycle productivity goals, etc.

Changing Older Couriers' Start Times:

Once upon a time, before Best Practice Pays/High-Velocity Culture Change, older couriers always had the earliest start times – it was the easiest money we make in any given day, less time pressure and better chance to organize your packages to ensure a smoother day. The early start time was one of three reasons us older couriers would bid (by seniority) on a new or open route (better chance for overtime; better organized routing for less mistakes; and better productivity for bigger bonuses). An altogether the three reasons translate into a larger monthly retirement check down the road.

My start time, like so many other older couriers began to change when Teri Galloway became our Senior Manager and began to echo the threat that Memphis' "Station Review Process" would effect more radical changes if the station didn't or wouldn't reduce its own in station and on-road hours and if you don't like change, there is the door! Thus, in April, 1995 many of us older couriers began to lose 25 minutes per day (later start time) to younger couriers who merely took our package handling hours, thus no real reduction. And later, on or about July 9, 1996, my perception of where and how management had pigeon-holed myself and other older couriers within their BBP age discrimination plan became *very clear*. At an A.M. meeting on July 9th, Ardy Piazza informed seven older couriers our start times would be moved back 10 minutes later and we

would not be allowed to use a Code 30 (general package handling code) – but must go directly into a fine sort Code 53.

Several couriers at the conclusion of this meeting told Mr. Piazza such "special" treatment by management would over-inflate our Code 53 (only 9 minutes allowed) and make each one of us appear as though we are dragging our feet and that would not be right. Sometime in the next week to ten days, management "discovered" the time-card computer program would not allow an employee to go directly into the fine sort Code 53 – that we must be in a general package handling Code 30 for a minimum of 10 minutes. Management tried to take credit for "relaxing" the new "No Code 30" policy without admitting the computer would not allow this but we already knew the truth via one of our CSA's (it should be noted, current CLW management tried to reinstate this "No Code 30" policy against us older couriers earlier this year – apparently they discovered the same problem after writing their memo).

The actual amount of time us older couriers would lose to younger couriers, swing drivers and p.m. "*overtime special*" employees can vary from time to time depending upon who they chose to place under the spot light. Management may show the EEOC start time schedules where younger couriers and others were also reduced, however, the initial action of removing us from the earliest start times and such "fine tuning" by Memphis' *industrial engineers* who take additional hours out of our weekly checks for months at a time is where the application of their discriminatory conduct festers. And such discriminatory conduct continues to infringe upon our current and future retirement income as well as our ability to retain our job due to the increased pressure to sort our truck to minimize mistakes (missing van scans, missorted packages, and over-looked P-1's) and at the same time, fighting off

management's negative comments and icy glares for not leaving the building more quickly than other younger co-workers who start earlier each day. This is just one of the many ways FedEx can directly tweak their hostile work environment up another notch and hope another older courier just walks away. Another prime example of disparaging treatment and management's intent to put us into a position to fail inside their hostile work environment becomes crystal clear when any of us go on vacation or take a single day off. The younger couriers' start almost ONE hour earlier and they ONLY take out about 80% of our normal work load so each younger courier can have a smooth and more efficient day. And then when we return from vacation, our respective manager then throws it in our face ... "What took you so long – the swing driver has better numbers and always gets back to the station at an earlier time." Confronting management with their discriminatory conduct sometimes produced some temporary relief (i.e. back in October of 2000, I told my manager exactly why the swing driver got back to the station quicker ... earlier start time with less stops in a smaller area ... and suddenly my start times were 30 minutes earlier the following week and when they were again pushed back to the later times, he told me I wasn't doing the job on the belt ... a week later he came back to me and said he was wrong to say that, but my start time didn't revert back to the earlier times). But the bottom line is management wants us older couriers to start later so we can try to go faster and catch up, causing you to make more mistakes while losing all concerns for safety. Economics are not even a consideration or why would management schedule PMer's to unload the AM freight for guaranteed overtime while they know older AM couriers will not get 35 hours and yet pay the guaranteed 35 hour minimum – management has never asked me if I would be willing to unload the AM freight and have an earlier start time. Management wants us to "see" the contrast; they tell us to

"save" ourselves and don't work over 8 hours. Meanwhile, younger couriers are working 12-14 hours to get the job done (Note: due to DOT regulations, no one can work over 12 hours a day so management merely "adjusts" the younger couriers' timecards by shifting the "excess" to another day – thus, my employer is breaking the ADEA by stealing work from older couriers and then not paying the overtime premium to those younger couriers). But economics is not even a motivating factor. Age discrimination is the goal! And I know and their actions prove I am one of their *targets*. I still give my employer 110% effort notwithstanding how I am being treated by them. I am submitting this affidavit in hope that Federal Express will return to the people company it once was and treat myself and other older couriers fairly according to the laws of this country.

I have read and had an opportunity to correct this Affidavit that together consist of ____ typed pages and swear that these facts are true to the best of my knowledge and belief.

/s/_____
Anthony W. Bost

Before me, the undersigned authority personally appeared /s/ Anthony W. Bost, who being duly sworn, says under oath that the matters and facts set out in the above document, consisting of 6 pages, true and correct to the best of his belief.

Sworn to before me, this 18 day of December, 2001 by /s/ Anthony W. Bost who has produced Fla Lic # B230-017-55-423-0 as identification.

My Commission expires:

/s/_____
Audrey Mary Maccia (Notary Public)

My Commission CC791543 Expires November 17, 2002

[stamped seal Audrey Mary Maccia
My commission CC791548
Expires November, 17, 2002]

APPENDIX H

TITLE 29. LABOR
CHAPTER 14. AGE DISCRIMINATION IN EMPLOYMENT

29 U.S.C. § 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 USCS §§ 621 et seq.;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of

meeting problems arising from the impact of age on employment.

29 U.S.C. § 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations. The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209 and 211).

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion. The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS § 623] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided,* That liquidated damages shall be payable only in cases of willful violations of this Act In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to

effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Secretary; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) [29 USCS § 633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice. Section 10 of the Portal-to-Portal Act of 1947 [29 USCS § 259] shall apply to actions under this Act. If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) [29 USCS § 630(a)] against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver.

(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in

court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 [29 USCS § 623 or 633a] may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 U.S.C. § 633. Federal-State relationship

(a) Federal action superseding State action. Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings. In the case of an alleged unlawful practice occurring in a State which has a law prohibiting

discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 USCS § 626] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER XIV -- EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1626 -- PROCEDURES -- AGE DISCRIMINATION IN EMPLOYMENT ACT

29 C.F.R. § 1626.1 Purpose.

The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of the Age Discrimination in Employment Act of 1967, as amended.

29 C.F.R. § 1626.3 Other definitions.

For purpose of this part, the term the Act shall mean the Age Discrimination in Employment Act of 1967, as amended; the Commission shall mean the Equal Employment Opportunity Commission or any of its designated representatives; charge shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act; complaint shall mean information received from any source, that is not a charge, which alleges that a named prospective defendant has engaged in or is about to engage in actions in violation of the Act; charging party means the person filing a charge; complainant means the person filing a complaint; and respondent means the person named as a prospective defendant in a charge or complaint, or as a result of a Commission-initiated investigation.

29 C.F.R. § 1626.6 Form of charge.

A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing.

29 C.F.R. § 1626.8 Contents of charge; amendment of charge.

(a) In addition to the requirements of § 1626.6, each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge;

(2) The full name and address of the person against whom the charge is made;

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;

(4) If known, the approximate number of employees of the prospective defendant employer or members of the prospective defendant labor organization.

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of § 1626.6.

(c) A charge may be amended to clarify or amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not again be referred to the appropriate State agency.

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No. 06-1322

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SUPREME COURT, U.S.

In the Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,

Petitioner,

v.

PAUL HOLOWECKI, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals, in ruling that Respondent Kennedy's Dec., 2001 filings were a charge under the ADEA , properly relied in part upon the lawful procedural regulation of the EEOC, 29 C.F. R. 1626, which provides that the first writing by a potential plaintiff to the EEOC that identifies the employer and generally alleges the discriminatory acts of the discrimination is sufficient to constitute a "charge"?

2. Whether the Second Circuit erred in ruling, contrary to the decision in *Bost et al v. Federal Express Corporation,* 372 F.3d 1233, (11th Cir. 2004), that a charging party should not be denied the right to bring suit to enforce the ADEA because of a failure of EEOC to perform its statutory duty to "promptly notify " the employer or other respondent of the filing of the charge ?

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No. 06-1322

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW AND JURISDICTION

The Opinion of the Court of Appeals for the Second Circuit reversing the district court's order granting a motion to dismiss the claims of the fourteen Plaintiffs-Respondents is published as 449 F.3d 558 and is reprinted in the Appendix to the Petition at 3a-23a. A timely motion for reconsideration was denied by that Court on October 31, 2006. 1a-2a. Plaintiffs-Respondents agree that the Petition was timely filed, and that this Court has jurisdiction to grant or deny the Petition. Pet. 1. The Memorandum and Order of the District Court dated October 9,2002 is not reported officially, but is reprinted at Pet. App. 31a-42a.

STATUTE AND REGULATION INVOLVED

This case involves the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq.(the "ADEA"). The provisions of that Act are set forth in the Appendix to the Petition, ("Pet. App.") 62a-68a. Under the heading Statute and Regulations Involved, the Petition refers to the ADEA, but does not cite the applicable Regulation of the United States Equal Employment Opportunity Commission (hereafter "EEOC"or "the Commission"), 29 C. F.R. 1626 or any other regulation. The relevant provisions of Regulation are however set forth at Pet. App. 68a-70a.

STATEMENT

1. The Underlying Facts. Petitioner Federal Express Corporation ("Federal Express") is engaged in the transportation of letters and other small packages by air and ground throughout the United States for next day delivery. Its "couriers" wear a purple uniform and drive small trucks with

"FedEx" logos on them from several hundred stations and make deliveries to, and pick-ups from, businesses and residences near their station. See the Complaint, R. 1.[1] Petitioner has employed approximately 29,000 or 30,000 couriers at the end of each year from 2001 through 2006. Petitioner employed the fourteen (14) Respondents as "couriers" in New York, California, Florida, Illinois, Michigan, and New Jersey.

Each of the fourteen Respondents was over the age of 40 and was employed by Federal Express as a courier and had more than 10 years of service with Petitioner Federal Express when the alleged age discriminatory conduct by Petitioner harmed him or her. R 1 and Pet. App. 32a-33a. The Complaint alleges that Federal Express "was placed on notice of the allegations that it was discriminating on the basis of age against couriers over the age of 40" no later than May 1995 and that "Some of the plaintiffs in this case timely notified the EEOC of the discriminatory practices by Federal Express more than 60 days before this date." R 1, Complaint para. 29.

2. The Applicable Regulation. The procedural Regulation of the EEOC under the ADEA states that a "charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s)," 29 C.F.R. 1626.6." See App. B, 14a. The Regulation also states that "...a charge is sufficient when the Commission receives from the person making the charge a written statement or information reduced to writing by the Commission that conforms to the requirements of 29 C. F.R. 1626." 29 C.F.R. 1626.8(b). Any failure to comply with the Regulation may be remedied by an amended charge that relates back to the date of the initial writing. 29 C.F.R. 1616.8(b). The procedural Regulation under

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[1] This Brief, like the Petition, will refer to the Docket Entry for document or documents involved. Thus R 1 refers to the Complaint.

the ADEA is substantially identical to EEOC's earlier Regulation under Title VII of the Civil Rights Act of 1964. 29 C.F.R. 1601.12(b), which was adopted many years earlier. See, for example, *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 296 (5th Cir. 1968).

3. Administrative Proceedings Before the EEOC. On September 11, 1998, Respondent Plaintiff McQuillan filed a "Charge" (EEOC Form 5) with the Commission. Pet. App. 38a. On Jan. 2, 2001 or earlier, Respondent Robertson filed a charge with the EEOC. Pet. App.21a, n.6.

Respondents McQuillan and Robertson alleged in their formal charges discriminatory conduct by Federal Express occurring in September 1998 and September 2000 respectively. Pet. App. 21a-22a.

On December 3, 2001, Respondent Kennedy filed with the EEOC a completed "Questionnaire and Affidavit"(EEOC Form 283) in which she alleges that Petitioner Federal Express has discriminated against her and other couriers on the grounds of age "via Best Practices Pays," and that Petitioner "targets myself and others" for less favorable treatment than younger couriers. Pet App.43a and fold out A 157. The Best Practices Pays program was planned and used to provide guidance and instructions to managers of couriers and couriers in the United States. The Kennedy Affidavit was notarized on Nov. 3, 2001. Pet. App.151-A. Her fully executed Questionnaire and Affidavit was received by the EEOC on December 3, 2001. See fold-out document A 157. and App. 10a. Respondent Kennedy filed her formal charge with EEOC on May 30, 2001.

4. Proceedings in the District Court. The fourteen Respondents-Plaintiffs including McQuillan, Robertson and Kennedy filed this suit on April 30, 2001, on behalf of themselves and other "similarly situated" couriers. They allege that Respondent Federal Express has engaged and is engaging

in a pattern or practice of age discriminatory policies and conduct against its older couriers beginning in 1995 and continuing to this day, and that the discriminatory practices were and are being carried out throughout the United States.

They seek an order directing that notice be provided to each member of the class of couriers that this case is a collective action under the ADEA, and class certification under Rule 23, Fed. R. Civ. P. under the laws of New York, California, Florida, Illinois, Michigan and New Jersey. Pet. App. E at 36a-37a. They seek prospective and retrospective relief under both the ADEA and the state laws for Petitioner's allegedly age discriminatory practices that harmed them, including back pay, double damages under the ADEA, and the additional relief provided by the laws of those states for age discriminatory conduct.

Petitioner Federal Express did not file an Answer in the district court but filed a motion to dismiss under Rule 12(b)(1) and (6) more than 60 days after the suit was filed. Petitioner asserted that no timely "charge" had been filed by any plaintiff.

In its Motion and Memorandum in Support in the district court, Petitioner failed to cite or discuss the above Regulation. Respondents cited the EEOC Regulation in its memorandum in Opposition to the Motion, but Petitioner also ignored that Regulation in its Reply Memorandum.

By Memorandum and Order, the district court granted the motion to dismiss under Rule 12(b)(6), without leave to replead. Pet App. D, 31a-42a. The district court did so without discussing or citing the applicable Regulation of the EEOC. *Id.*

The district court dismissed the claims of Respondents McQuillan and Robertson as "untimely"on the ground that the suit was filed more than 300 days after "the implementation of" the age discriminatory policies and practices of Federal Express in 1994 or 1995. Pet App. 38a. It ruled that their

claims were "time-barred." Pet 38a. Thus, the district court ruled that those claims were filed too late. *Id.*

With respect to Respondent Kennedy's filings, the district court ruled that "Section 626(d) of the ADEA specifically requires that a 'charge' be filed with the EEOC at least 60 days prior to commencing a civil action. If Congress had intended that an intake questionnaire or Affidavit constituted sufficient notice, it could have specifically stated so. But it did not." App. 39a.

The district court quoted from the decision in *Novitsky v. Am. Consulting Eng'rs,* 196 F. 3d 699, 702 (7th Cir. 1999) to the effect that "[I]t is the charge that matters. Only the charge is sent to the employer....only the charge can effect the process of conciliation." App. 40a.. The district court did not discuss or even cite the procedural Regulation of the EEOC quoted above.

With respect to Petitioner Kennedy's charge, the district court ruled that she should have waited 60 days after her Form 5 charge was filed with EEOC before filing suit. Her Form 5 charge was "untimely since it was filed one month after the current action was filed." Pet App. 39. Its holding is that the Complaint was filed too soon.

In their Motion to Alter or Amend, filed on October 23, 2006, the Respondents cited and relied upon the EEOC regulation, 29 C.F. R. 1626.3, 6 and 8, and the decisions of this Court and the Fourth Circuit in *Edelman v. Lynchburg College,* 535 U.S. 106 (2002) and 300 F.3d 400 (4th Cir. 2002). Respondents argued that under those decisions and the lawful regulation of the EEOC, "the Questionnaire and Affidavit of Patricia Kennedy was a charge in December, 2001, when the EEOC received them." Pet. App. C 25a. On May 4, 2004, the district court denied that motion without stated reason. App. 24a.

5. The Decision of the Second Circuit in this Case.

The Court of Appeals ruled unanimously that the Kennedy Intake Questionnaire and Affidavit of Dec. 3, 2001 was a charge under the ADEA. It noted that the ADEA does not define the word "charge" and that the "interpreting regulations" require only "minimal information", that it only requires that the document "names the employer and generally describes the allegedly discriminatory acts." Pet. App. 14a. In addition, it joined other appellate courts in accepting a "manifest intent rule," when a document received by EEOC is not on Form 5 (a charge), it will be considered a charge "only when the writing demonstrates that an individual seeks to activate the administrative and conciliatory process" of the EEOC. Pet. App. 15a.

With respect to Petitioner Kennedy, the Court of Appeals below ruled that "if an individual satisfactorily notifies the EEOC of her charge, she is not foreclosed from federal suit merely because the EEOC fails to follow through with notifying the employer and attempting to resolve the matter through 'conciliation, conference and persuasion...'" Pet. App. 16a. "Such a holding would establish a prerequisite to suit beyond a prospective plaintiff's control and therefore would be contrary to the spirit and purpose of the Act." Pet. App. 17a, quoting from *Bihler v. The Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983)("'that would convince a reasonable person" that she 'intends to activate the Act's machinery'"; *Hodge v. New York Coll. of Podiatric Med.*, 157 F.3d 164, 167-68 (2d Cir. 1998); *Edelman v. Lynchburg College*, 300 F.3d 400, 404-405 (4th Cir. 2002). The Court of Appeals stated " Kennedy's questionnaire constituted a 'charge" because (1) its content satisfied the statutory and regulatory requirements for what content must be included in a charge, and (2) the questionnaire communicated Kennedy's intent to activate the EEOC's administrative process." Pet. App. 17a..

The Court of Appeals below also ruled that the charges of McQuillan and Robertson were filed within 300 days of the alleged discriminatory conduct against them, and therefore vacated the district court's grant of the Respondent's motion to dismiss their claims, and remanded the case to the district court for further proceedings. Pet App. 21a-22a. Petitioner Federal Express does not seek review of the decision below as to those Respondents. Pet. 4-5.

REASONS FOR DENYING REVIEW

There are and will be further proceedings in the district court on the claims of McQuillan and Robertson and other couriers even if the district court's ruling that Kennedy's claim was "premature" is sustained. See the preceding para. above. Also, it is settled that the timely notice provided to EEOC is sufficient whether or not the charging party is a party to the ensuing law suit. *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2nd Cir. 1980).

The valid Regulation of the EEOC provides that a charge "shall be in writing and shall generally allege the discriminatory acts" and "is sufficient when the Commission receives from the person making the charge...a written statement...that conforms to the requirements of 1626.6" 29 C.F. R. 1626.8(b). Pet. App. 14a. The Questionnaire and Affidavit twice signed by Petitioner Kennedy and received by the Commission on Dec. 3, 2001 met those standards, *Id.*, and it also provided all of the information that a charge "should contain." Pet. App. 14a-15a.

The decision below should be sustained on the ground that the EEOC's regulation is lawful and should be effectuated. *Edelman v. Lynchburg College*, 300 Fed. 3d 400, 404-405.(4th Cir. 2002). For by its own terms, the Regulation provides that a writing may be any charge, and when it conforms to all of the

requirements of the Regulation it is a charge, at least in the absence of any conduct or writing by the charging party expressly to the contrary.

1. There Is No Conflict on an Important Matter between the Decision below and the Decisions of other Circuits "on the same important matter" Because Both Courts Applied the Manifest Intent Rule to Different Documents..

There is no conflict between the decision of the Court of Appeals for the Second Circuit below with the decision in *Bost et al. v. Federal Express Corporation,* 372 F. 3d 1233 (11th Cir. 2004) on the "same important matter." Rule 10 of this Court.

For the Second Circuit below, like the Eleventh Circuit in *Bost, supra,* applied the "manifest intent" standard or "test" for determining whether the first document received by the EEOC is a "charge" under the ADEA or Title VII. Pet. 25. Under that standard each court determines whether the charging party has an "intent" to have EEOC notify the employer of its receipt of the writing and/or to have it commence an investigation and efforts at conciliation.

Questions of the intent of a written document in federal court, such as a possible contract, are usually for the district court initially, but review is usually for error of law. The Court of Appeals below ruled that Petitioner Kennedy's fully executed Questionnaire and Affidavit showed her intent to activate the EEOC process, while the Eleventh Circuit ruled that Anthony Bost, who is a courier for Federal Express but not a party to this suit, did not have such an intent. Even while both courts applied the same "manifest intent" standard, a different intent for different persons is unremarkable, particularly if their

writings are different.[2]

The Petition asserts that the decision of the Second Circuit "is in conflict with the decision of another U. S. Court of Appeals on the same important manner." Pet. 14-15, citing S. Ct. Rule 10 On the contrary, the two courts of appeals applied the same analysis, but came to different conclusions about different writings by different employees of Federal Express. Such a difference is not on the "same" matter, and certainly is not on "the same important" matter within the meaning Rule 10.

2. Under the Charge Filing Regulation, Kennedy Could Have Been a Plaintiff in this Suit, even If She had Not filed a Form 5 Formal Charge.

The charge filing Regulation of EEOC is consistent with the purposes of the ADEA. Indeed, the language of that 29 C. F. R. 1626 Pet. App. 69a-70a. That regulation is taken almost verbatim from the Conference Report of the 1978 amendments which incorporated the charge filing features of Title VII into the ADEA. Congress intended to reduce the number of lawsuits that were dismissed because plaintiffs' notice was filed too late. *Id.* And the relation back provision

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[2] Respondent Kennedy signed her Intake Questionnaire twice, once on Dec. 3, 2001 and again two months later on February 3, 2002, suggesting two separate mailings to the EEOC, and some response by EEOC, when it was asked what had happened to her first filing. See, Pet. App. 157. In addition, unlike Bost, Kennedy's Affidavit states "I believe my employer's actions violate my civil rights." Pet. App. 45a; compare Pet. App. for Bost, App. 55. Further, and, as the Second Circuit stated, "...most tellingly, the affidavit unambiguously states '[p]lease force Federal Express to end their age discrimination plan so we can finish out our careers ...." Pet App. 19a. As Petitioner Kennedy apparently understood, EEOC's only vehicle for compelling Federal Express to end the discrimination is a law suit. Courier Bost's affidavit had no comparable statement. Pet. App 55a-60a, see particularly 69a.

set forth in 29 C. F. R. 1626.8(c) is almost identical to that in the older Title VII regulation. 29 C. F. R. 1601.12(b). The Conference Report states: "The conferees intend that 'charge' requirements will be satisfied by the filing of a written statement that identifies the potential defendant and generally describes the action believed to be discriminatory." H. R. Conf. Rep. 95-950 (March 14, 1978) at 8. *Zipes v. Trans World Airlines, Inc.*, 455 U. S. 385, 395 fn.11 Compare 29 C. F. R. 1626.6 and 1626.8(b) at Pet. App. 69a and 70(a).

This Court has recognized that the relation back regulation is lawful and valid. *Edelman v. Lynchburg College*, 535 U. S. 536 (2002).

The EEOC Regulation is lawful and binding upon the parties, and is applicable to letters as well as other informal documents which are not on Form 5. *Edelman v. Lynchburg College*, 300 F.3d 400, 404-405 (4th Cir. 2002). See Pet. at 27. Respondents believe that the decision of the Fourth Circuit is a correct statement of the law. In that case, the Fourth Circuit ruled on remand from the decision of the Supreme Court in *Edelman v. Lynchburg College, supra*, 535 U.S.536."The Code of Federal Regulations provides that 'a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of.'" *Edelman*, 535 U. S. at ..., n.2, quoting from 29 C. F.R. 1601.12(b), also quoted by the Fourth Circuit in *Edelman*, 300 F.3d at 404. The Code of Federal Regulations has substantially the same language with respect to charges under the ADEA. 29 C. F. R. 1626.3, 1626.6 and 1626.8(b)

In this case three Plaintiffs-Respondents filed charges within 300 days of the last day of harm caused them by the allegedly discriminatory practices of Federal Express. McQuillan, Robertson and Kennedy. Pet. App. 9a-10a, and 21a-22a. McQuillan's charge was filed in 1998, and

Robertson's charge was filed in 2001, and both of them were filed more than 60 days before the filing of this case. Pet. App. 21a-22a.

If the district court had not erroneously dismissed the claims of McQuillan and Robertson, however, Petitioner Kennedy had the right to opt-in to that case under the broad "opt-in" provisions of the ADEA. 29 U.S.C. 626(b) which incorporates 29 U.S.C. 216(b). Under that provision, any employee harmed by the same or similar practice can opt into a suit to enforce the provisions of the Act if the same or similar practices and time frames are involved. "Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively." *Hoffmann-La Roche, Inc.*, 493 U.S. 165, 170 (1989).

Even if the Kennedy filing of Dec. 3, 2001 was not a charge, therefore, the formal charge she filed on May 30, 2002 related back to Dec. 3, 2001. 29 C.F.R. 1626.8 (c). That formal charge therefore would have cured any defect in the earlier filing, but would be considered filed on Dec. 3, 2001. 29 C.F.R. 1626.8(c); Accord: Rule 15, Fed. R. Civ. The "EEOC's relation-back" regulation is "an unassailable interpretation of" Title VII", or at least "EEOC possessed the authority to promulgate the procedural regulation...the regulation is reasonable and not proscribed by the statute...." *Edelman v. Lynchburg College*, 535 U.S. 106, 115, and 119-20 (2002).

Indeed in that decision this Court " upheld the EEOC regulation" because of the "long history of practice...permitted 'relation back' of a verification missing from the original filing. 535 U. S. at 116. There is no reason that the "relation back of the oath is any less reasonable than the relation back signature" in *Becker v. Montgomery*, 532 U. S. 757 (2001). More recently, this Court has applied the same kind of reasoning to fee applications under the Equal Access to Justice Act. *Scarborough v. Principi, Sec. of VA*, 541 U. S. 401 (2004).

The Petition nowhere cites any evidence that Petitioner was harmed by EEOC's apparent failure to provide it with prompt notice of the filing of the Kennedy Intake Questionnaire and Charge. Petitioner introduced no evidence in the courts below showing any harm caused by EEOC's failure to perform its statutory obligation to provide prompt notice. Yet lack of harm is one factor that this Court can and has taken into account in determining the validity of "relation back" of procedural requirements. *Scarborough v. Principi, Sec. of VA, supra,* 541 U.S. at 403-404.

Under the express language of the EEOC regulation, any subsequent filing by a charging party relates back to the date of the first charge. 29 C. F. R. 1626.8(b). Accord: Rule 15(c); 541 U. S. at 417-418. Even if there had been defects in Kennedy's first filing, they were eliminated by her filing of May, 2002, which related back to Dec. 3, 2001, more than 90 days before this suit was filed on April 30, 2002. *Scarborough v. Principi, Sec. of VA,* 541 U. S. 401 (2004).

3. This Court Should Reject Petitioner's Argument that the EEOC's Failure to Implement its Regulation Should Bar Charging Parties Who Have Provided EEOC with Timely Notice their Right to Bring Suit to Enforce Their Rights.

Any argument that the law should deny a charging party who has filed a timely document with the EEOC advising it of the identity of the parties and the general nature of the alleged discrimination is inconsistent with the purposes of the ADEA and Title VII, and with the Regulation of the EEOC. In *Edelman,* 300 F.3d at 404, the defendant College did not challenge the status of the letter received by EEOC on the grounds of its "substantive contents," but rather "because the EEOC did not assign it an EEOC number, forward a copy to the College or the VCHR." 300 F. 3d at 404. Similarly the Petitioner here also seeks that reversal of the decision below because "Generally...the EEOC does not treat such informal

documents as charges, neither providing notice of them to prospective defendant employers nor beginning investigation and conciliation efforts..." Pet. 9.

As the Fourth Circuit observed, however, "The problems noted by the College are not deficiencies in the charge; they are failures of the EEOC to fulfill its statutory duties...a simple failure by the EEOC to fulfill its statutory duties regarding the charge does not preclude a plaintiff's Title VII claim." 300 F.3d at 404-405. Similarly, in this case, the failures of the EEOC to treat the Kennedy Intake Questionnaire and Affidavit as a charge should not and do not warrant the denial to Plaintiff Kennedy and the other Respondents of the right to prosecute this lawsuit. Accordingly, these cases do not reflect any conflict on "an important federal question." Rule 10(a) Rules of Court. [3]

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[3] Petitioner also argues (at p. 15) that the decision of the Second Circuit below is in conflict with decisions of the Third Circuit in *Bailey v. United Airlines*, 279 F. 3d 194, 199 n.2 (3d Cir. 2002); and with a decision of the Sixth Cir. in *Dunn v. General Motors*, 131 Fed. Appx. 462, 470 n. 7 (6th Cir.2005), However, the issue of the validity of the EEOC Regulation defining a charge was not argued or even mentioned in *Bailey v. United Airlines, supra.* The decision in *Dinn v. General Motors, supra,* was "NOT RECOMMENDED FOR FULL-TEXT PUBLICATION" under Sixth Circuit Rule 28(g); and attorneys in that Court are instructed not to rely upon it in their briefs unless there is no other decision in that Court on the issue involved.. That decision is not considered precedential in the Sixth Circuit, and should not be so considered in this Court. In addition, *Dunn v. General Motors, supra,* did not rely upon or even cite the applicable portions of the EEOC Regulation, 29 C.F. R. 1626.6 and 1628(b).

CONCLUSION

For the Reasons set forth above, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted.,

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PAUL HOLOWECKI, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

Supreme Court of the United States

No. 06-1322

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

PAUL HOLOWECKI, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this brief as *amici curiae*.[1] Letters of consent from both parties have been filed with the Clerk of the Court. The brief supports the petition for a writ of certiorari.

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 315 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, as well as other equal employment laws and regulations. As employers, and as potential respondents to charges of age discrimination under the ADEA, EEAC's and the Chamber's members have a significant interest in the issues raised by the Petition for Writ of Certiorari.

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case will have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant

matters that have not already been brought to its attention by the parties. Because of their experience in these matters, EEAC and the Chamber are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Patricia Kennedy worked as a courier for Federal Express Corporation (FedEx). Pet. App. 4a. In December of 2001, Kennedy filled out an Equal Employment Opportunity Commission (EEOC) intake questionnaire and submitted it to the agency along with a four-page, signed affidavit, alleging that FedEx's new performance standards discriminated against older workers. Pet. App. 8a.

The EEOC took no action in response to Kennedy's intake questionnaire. Pet. App. 39a. It did not notify FedEx that a charge had been filed and did not assign a charge number. *Id.* Nor did the agency investigate Kennedy's allegations. *Id.* Several weeks later, Kennedy filed an ADEA class action lawsuit along with a group of other FedEx employees—including Paul Holowecki, the lead plaintiff in the case. *Id.* at 18a, 38a. Only after initiating suit did Kennedy file a formal charge of discrimination with the EEOC. *Id.* at 33a.

Holowecki and the other plaintiffs argued that Kennedy's intake questionnaire constituted a valid charge upon which they could "piggyback" their claims. *Id.* at 12a. A federal trial court dismissed the lawsuit, however, ruling that Kennedy's intake questionnaire was not "the equivalent of a charge" and, therefore, the plaintiffs' claim was untimely because it was filed one month after suit had been filed. *Id.* at 39a.

On plaintiffs' appeal, the Second Circuit reversed, concluding that Kennedy's intake questionnaire constituted a valid EEOC charge, even though the EEOC never treated it as

one and Kennedy later returned to the agency to file a charge. *Id.* at 20a. While the ADEA requires an individual to file a timely charge with the EEOC before bringing suit, the Second Circuit ruled that the regulatory requirements are "minimal" and, therefore, any minimally sufficient intake questionnaire would suffice as a charge so long as it "manifest[s] an individual's intent to have the agency initiate its investigatory and conciliatory process." *Id.* at 14a-15a. Because Kennedy's questionnaire contained full contact information for the employer and provided information about alleged violations of the ADEA, the court concluded that it satisfied the statutory and regulatory requirements for the content of an ADEA charge, even though FedEx never received notice of the charge. *Id.* at 18a. Moreover, the "forceful tone" of the questionnaire and affidavit communicated Kennedy's "intent to activate the [EEOC's] administrative process," the court said. *Id.* at 19a.

FedEx filed the instant Petition for Writ of Certiorari on March 30, 2007.

SUMMARY OF ARGUMENT

Congress expressly provided that individuals claiming a violation of the ADEA are required to exhaust administrative remedies by filing a charge of discrimination with the EEOC prior to initiating suit in federal court. 29 U.S.C. § 626(d). The important purpose behind this statutory requirement is to provide the EEOC "with an opportunity 'to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance . . . .'" Pet. App. 15a.

There is a sharp division among the circuit courts of appeals as to whether a discrimination plaintiff satisfies this charge filing requirement simply by completing an EEOC "intake questionnaire"—a form used by the agency to facilitate pre-charge interviews with prospective claimants. In most cases, as the case was here, the EEOC does not notify

the employer when an intake questionnaire is received or otherwise treat the form as a charge.

While some courts are willing to recognize an intake questionnaire as a charge in the fairly unusual situation where the EEOC actually processes the questionnaire as one, they do not agree on whether the submission of an intake questionnaire accomplishes a charge filing when the agency does not provide notice to the employer or treat the questionnaire as a charge. At least one court has suggested that *any* intake questionnaire submitted to the EEOC is a charge, for example, while another has said an intake questionnaire can *never* be a charge. *Compare Casavantes v. California State Univ.*, 732 F.3d 1441, 1443 (9th Cir. 1984) *with Dorn v. General Motors Corp.*, 131 Fed. Appx. 462 (6th Cir.), *cert. denied*, 546 U.S. 937 (2005). Other courts have ruled that an unserved, unprocessed intake questionnaire may only function as a filed charge if the EEOC misled the plaintiff about the status of the questionnaire. *See e.g.*, *Perkins v. Silverstein*, 939 F.2d 463 (7th Cir. 1991); *Steffan v. Meridian Life Ins. Co.*, 859 F.2d 534 (7th Cir. 1988); *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672 (8th Cir. 1996); *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314 (11th Cir. 2001). The Second Circuit has applied an entirely new standard that would render an intake questionnaire a filed charge any time the questionnaire purports to "communicate[ ] [the employee's] intent to activate the EEOC administrative process," no matter what representations the EEOC may have made concerning the status of the questionnaire and regardless of whether notice was ever provided to the employer. Pet. App. 18a.

Guidance from this Court therefore is needed to determine when (if ever) the mere submission of a completed intake questionnaire will satisfy a plaintiff's charge filing requirements. The question is of significant importance to employers because in the absence of a formal charge, the agency will not notify the employer of the allegations or provide an

opportunity to reach a voluntary resolution. Under the Second Circuit's rule, a plaintiff who failed to file a valid EEOC charge will be permitted to litigate in federal court, even if it means the employer's first notice of alleged discrimination comes when it is served with a civil complaint.

In addition to frustrating the EEOC's investigation and conciliation goals, the decision below thus unduly hampers employer-respondents' efforts to address and resolve potential discrimination in a manner that is quick, effective and mutually beneficial. Indeed, it encourages, rather than discourages, lengthy litigation.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW OF THE DECISION BELOW TO RESOLVE THE SPLIT AMONG THE CIRCUIT COURTS OF APPEALS ON THE QUESTION OF WHETHER THE MERE ACT OF SUBMITTING TO THE EEOC A PRE-CHARGE "INTAKE QUESTIONNAIRE" WILL SATISFY THE ADEA'S CHARGE FILING REQUIREMENTS WHEN THE AGENCY DOES NOT TREAT THE FORM AS A CHARGE

As one of the premier federal civil rights enforcement agencies, it is the Equal Employment Opportunity Commission's mission to prevent and correct unlawful employment practices, which it does through investigation, voluntary settlement and conciliation and, in extraordinary instances, litigation in the public interest. Where an individual suspects unlawful employment discrimination has occurred, he or she is required to first exhaust administrative remedies by filing a charge of discrimination with the EEOC.

The dispute in this case centers on whether an age discrimination plaintiff can satisfy the ADEA's charge filing requirement simply by completing an EEOC "intake ques-

tionnaire"—a form used by the agency to facilitate interviews with potential charge filers. Many thousands of prospective claimants complete intake questionnaires each year, although not all of them ultimately decide to file a charge. Moreover, because of the preliminary nature of the questionnaire, the EEOC will not notify the employer or conduct an investigation when an intake questionnaire is received, as it does when a charge is filed. Guidance from this Court therefore is needed to determine when (if ever) the mere submission of an EEOC intake questionnaire will accomplish a charge filing.

A. Under EEOC Procedural Rules, "Intake Questionnaires" Generally Are Not Processed As Charges

Although the EEOC's charge intake process can vary from office to office, all offices generally follow certain basic procedures. When a potential charge filer first approaches the EEOC, he or she typically will be asked to fill out an "intake questionnaire" or a "Form 283." EEOC Compl. Man. § 1.7, Office Visitor Requests (June 2001). The intake questionnaire serves as a "preliminary device" designed to help an EEOC investigator, or other agency staff who perform charge intake functions, conduct an intake interview—the next step in the intake process.[2] *Id.* During the interview, EEOC staff will determine whether the person's complaint falls within the agency's jurisdiction, and possibly prepare a charge on an EEOC "Form 5" charge form. *Id.* at § 2.5, Drafting the Charge/Complaint (Oct. 2002). Once an individual signs the charge form, the agency will assign a charge number and

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[2] The form itself states that the information provided is "used by Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over allegations of employment discrimination and to provide such charge filing counseling as is appropriate." EEOC Compl. Man. § 1 (June 2001) (EEOC Form 283, Charge Questionnaire, Exh. 1-B).

serve "prompt" notice to the employer (or notice within ten days if the charge alleges violations of Title VII or the ADA). *Id.* at § 2.7, Docketing and Disposition of Charges/Complaints (Aug. 2002) and § 3.1, Introduction (June 2001).

When an intake interview reveals that the agency has no jurisdiction over a complaint, however, EEOC intake staff will counsel the individual or make a referral. *Id.* at § 1.7, Office Visitor Requests (June 2001) and § 2.4, Pre-Charge Counseling (Aug. 2002). An individual might also choose not to pursue a claim over which the agency does have jurisdiction. *Id.* at § 1.7, Office Visitor Requests (June 2001). In situations where the prospective charge filer ultimately decides not to pursue a claim, the agency will place the intake questionnaire in a "suspense file" where it remains until it is eventually discarded. *Id.* at § 1.7, Office Visitor Requests (June 2001) and § 2.7, Docketing and Disposition of Charges/Complaints (Aug. 2002). No notice is given to the employer, and no investigation is conducted.

Accordingly, under the EEOC's procedural rules, intake questionnaires generally are not treated as charges, and the agency does not routinely investigate them.

B. The Federal Circuit Courts Of Appeals Disagree On Whether, And Under What Circumstances, The Submission Of An EEOC Intake Questionnaire Might Be Sufficient To Accomplish A Charge Filing

Whether an individual can satisfy the ADEA's charge filing requirement simply by filling out an intake questionnaire is a question that has divided the federal courts of appeals. Generally speaking, courts appear willing to recognize an EEOC intake questionnaire as a filed charge in the relatively rare situation when a questionnaire both satisfies EEOC regulations concerning the sufficiency of charges and *the agency actually processes the form as a charge*. *See*

Clark v. Coats & Clark, Inc., 865 F.2d 1237 (11th Cir. 1989) (plaintiff's intake questionnaire could serve as a charge of discrimination where the questionnaire contained the information needed to support a charge and the EEOC treated it as such by serving notice on the employer); *Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir. 1991) (EEOC intake questionnaire would suffice as a charge where the agency assigned it a charge number and promptly notified the employer that a charge had been filed); *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir. 1982) (the fact that the EEOC initiated the enforcement process in response to its receipt of plaintiff's completed charge intake questionnaire is "relevant" to the question of whether a charge had been filed with the agency).

Where the EEOC did not treat the plaintiff's intake questionnaire as a charge, however, the courts have taken varying approaches. At one end of the spectrum, the Ninth Circuit has suggested *any* intake questionnaire can be considered a charge filed with the agency, regardless of how the EEOC actually treats the form. *Casavantes v. California State Univ.*, 732 F.2d 1441, 1443 (9th Cir. 1984) (completed intake questionnaire providing "'a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of'" sufficient to constitute a charge). At the other end, the Sixth Circuit has said an intake questionnaire that is neither served on the employer nor investigated by the agency constitutes an "inquiry or complaint," but is not a filed charge. *Dorn v. General Motors Corp.*, 131 Fed. Appx. 462, 470 n.7 (6th Cir.), *cert. denied*, 546 U.S. 937 (2005). In the *Dorn* case, the EEOC did not act on the plaintiff's intake questionnaire or notify the employer of the allegations until the plaintiff submitted a signed EEOC charge form almost a year later. *Id.* at 470.

Other appellate courts have rejected both of these views, recognizing intake questionnaires as filed charges only in

limited situations. The Seventh Circuit has said, for example, that an intake questionnaire might satisfy the charge filing requirement if: 1) "the information contained in the questionnaire [is] sufficient to constitute a charge"; and 2) both the EEOC and the plaintiff indicated "they would treat the questionnaire as a charge," even if the agency ultimately failed to do so. *Perkins v. Silverstein*, 939 F.2d 463, 470 (7th Cir. 1991). In other words, the Seventh Circuit will recognize an intake questionnaire as a charge to avoid penalizing a plaintiff for the EEOC's failure to accomplish a timely filing when the agency promised to do so. Accordingly, in a case where an EEOC intake official mistakenly told one plaintiff that filing an intake questionnaire would preserve the plaintiff's private suit rights, the Seventh Circuit determined that the questionnaire amounted to a charge filed with the agency. *Steffan v. Meridian Life Ins. Co.*, 859 F.2d 534, 544 (7th Cir. 1988). At the same time, the Seventh Circuit will not recognize an intake questionnaire as a filed charge where the EEOC does not treat the questionnaire as one and, in fact, advises the plaintiff more information is needed to file a claim. *Perkins*, 939 F.2d at 470.

The Eighth Circuit took a similar position in a case involving a state administrative agency's intake form. In *Diez v. Minnesota Mining & Manufacturing Co.*, 88 F.3d 672 (8th Cir. 1996), the court concluded that an intake questionnaire would only serve as a charge of discrimination if the plaintiff intended the questionnaire to be a charge and the agency led him to believe that it would be. *Id.* at 677. Likewise, in *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314 (11th Cir. 2001), the Eleventh Circuit ruled that the plaintiff's intake questionnaire satisfied the charge filing requirement because the plaintiff "manifested her intent" to file, reasonably believed the EEOC would accomplish a timely filing, and eventually succeeded in "prodding" the agency to process the questionnaire as a charge. *Id.* at 1321.

Where there is no evidence to suggest that the plaintiff intended the intake questionnaire to function as a charge, however, or that the EEOC gave the plaintiff false assurances concerning the status of the questionnaire as a charge, the Eleventh Circuit has concluded that the form will not operate as one. In *Bost v. Federal Express Corp.*, 372 F.3d 1233 (11th Cir. 2004), a case that parallels this one in virtually every respect but the outcome, the court ruled that the ADEA plaintiffs had "impermissibly bypassed the administrative process" by filing suit in court before initiating an administrative charge with the EEOC. *Id.* at 1241. Like Kennedy, the lead plaintiff in *Bost* provided the agency with a completed intake questionnaire and affidavit, but then failed to communicate further with the agency. *Id.* at 1236. Five months later, Bost and five "piggybackers" filed suit against the company, notwithstanding the fact that the EEOC never treated the intake questionnaire as a charge or provided notice of the claim to the employer. *Id.* A month after filing suit, Bost returned to EEOC to complete an EEOC charge form, which the agency then docketed and served on the employer. *Id.*

Unlike the Second Circuit in this case, however, the Eleventh Circuit in *Bost* affirmed dismissal of the plaintiffs' suit. Is so ruling, the court reasoned that the EEOC had not treated the questionnaire as a charge, and the plaintiff had offered no evidence of misleading communications by the EEOC concerning the status of the submission. *Id.* at 1240. Moreover, the court pointed out, "[i]f Bost believed that he had filed a charge of discrimination when he filed the intake questionnaire, he would not have filed an additional timely charge of discrimination" after the lawsuit was filed. *Id.* at 1241. Accordingly, the court ruled, Bost's suit was "premature." *Id.* at 1243.

The Second Circuit has applied an entirely new (and purely subjective) standard that would render an intake questionnaire

a filed charge anytime the questionnaire purports to "communicate[ ] [the employee's] intent to activate the EEOC administrative process." Pet. App. 18a. Under this standard, it matters not that the EEOC never processed the form as a charge by docketing it, providing notice to the employer, and conducting an investigation. *Id.* at 39a. Nor does it matter that the EEOC never suggested to the employee that the form would be considered a charge. *Id.* Instead, all the employee would have to do is submit a questionnaire that contains "forceful tone and content," sufficient to alert the EEOC to the fact that the employee believes he or she has been the victim of discrimination. *Id.* at 19a.

This conflict in the courts of appeals, only deepened by the decision below, merits this Court's review. Accordingly, the Petition should be granted.

II. EXCUSING PLAINTIFFS' OBLIGATION TO EXHAUST ADMINISTRATIVE REMEDIES PREVENTS THE EEOC FROM DISCHARGING ITS STATUTORY DUTY TO INVESTIGATE AND CONCILIATE, WHILE ALSO UNDERMINING EMPLOYER EFFORTS TO RESOLVE CLAIMS INFORMALLY

A. The EEOC Cannot Fulfill Its Statutory Duty To Provide Notice To Employers And Conciliate Claims Of Employment Discrimination Where The Parties Claiming Unlawful Discrimination Are Permitted To Bypass The Charge Filing Process And Proceed Directly To Court

Congress expressly provided that individuals claiming a violation of the ADEA are required to exhaust administrative remedies by filing a charge of discrimination with the EEOC prior to initiating suit in federal court. 29 U.S.C. § 626(d). The important purpose behind this statutory requirement is to

provide "the EEOC with an opportunity to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance . . . ." Pet. App. 15a.

Accordingly, upon receipt of a charge of age discrimination, the EEOC must "promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d). The legislative history of the ADEA confirms that Congress deliberately selected administrative resolution as the preferred means for resolution of employment discrimination claims:

> A condition precedent to the bringing of an action by an individual is that he must give the Secretary 60 days notice of his intention to do so. This is to allow time for the Secretary to mediate the grievance. It is intended that the responsibility for enforcement vested in the Secretary by Section 7 be initially directed through informal methods of conciliation and that the formal methods be applied only if voluntary compliance cannot be achieved.[3]

Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038 (5th Cir. 1977) (quoting 113 Cong. Rec. 31250 (Nov. 6, 1967)); *see also Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 841 (3d Cir. 1977) ("The thrust of the ADEA's enforcement provisions is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor").

Congress made the same choice with respect to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Whenever a charge of discrimination is filed under Title VII, the EEOC statutorily is required to provide the employer-

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[3] Administrative enforcement responsibility was transferred from the Secretary of Labor to the EEOC in 1972.

respondent with notice of the charge and to investigate the allegations. 42 U.S.C. § 2000e-5(b). The purpose of this administrative scheme is to allow the EEOC "to settle disputes through conference, conciliation, and persuasion before the aggrieved party is permitted to file a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), this Court considered the question of whether an ADEA plaintiff forfeits his ability to pursue an action in federal court where he fails first to submit his claim to a state agency for administrative resolution. Noting the similarities between Title VII and the ADEA's enforcement schemes, the Court stated a clear preference for administrative resolution of discrimination claims, particularly those arising under the ADEA, observing that Congress "intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state [administrative] proceedings." *Id.* at 756 (citations and internal quotations omitted).

Accordingly, the EEOC is not merely a short stop to have one's ticket punched on the way to federal court. Rather, the EEOC's statutorily required efforts at "conciliation, conference and persuasion" form the cornerstone of enforcement of federal anti-discrimination laws. Where as here a plaintiff submits a completed intake questionnaire, but then files a lawsuit without first having taken care to ensure a proper administrative charge was filed, the exhaustion requirement is not satisfied. Moreover, the employer is deprived of statutorily required notice of the claim, and the EEOC is prevented from investigating and conciliating it.

Generally speaking, the EEOC's charge filing procedures are straightforward, and prospective claimants should be required to follow them. Under those procedures, "an intake questionnaire is not intended to function as a charge," because the purpose of a charge (unlike the intake question-

naire) is to: 1) notify the employer that a discrimination charge has been filed with the EEOC; and 2) initiate the EEOC investigation of the complaint. *Pijnenburg v. West Ga. Health Sys., Inc.*, 255 F.3d 1304, 1305-06 (11th Cir. 2001). Accordingly, "[t]o randomly treat [the] questionnaire as a charge would thwart these two objectives." *Id.* at 1306. Likewise, as the Seventh Circuit has observed, to recognize intake questionnaires "willy-nilly as charges would be to dispense with the requirement of notification of the prospective defendant, since that is a requirement only of the charge and not of the questionnaire." *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992).

It is apparent that the plaintiffs in this case viewed the EEOC as a brief obligatory stop along the way to litigation—a necessary evil rather than as Congress' preferred solution. An employer's first notice of a discrimination claim should never come in the form of a private lawsuit as it did here. A ruling by this Court is needed to make clear that exhausting administrative remedies by filing an EEOC charge is required before a lawsuit may be brought. Under the EEOC's procedures, filling out an intake questionnaire is not tantamount to "filing" a charge, except perhaps in the rare instance when the questionnaire both satisfies EEOC regulations concerning the sufficiency of charges and is actually *treated as a charge* by the agency, with prompt notice provided to the employer.

Nor is it necessary for courts to depart from this general rule to rescue an otherwise untimely claim that may have resulted from misinformation provided by the EEOC. The courts have long applied the doctrine of equitable tolling to excuse untimely filings directly attributable to the EEOC's neglect. *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75 (7th Cir. 1992); *Schlueter v. Anheuser-Busch, Inc.*, 132 F.3d 455 (8th Cir. 1998). Applying this doctrine in appropriate cases—rather than indiscriminately "deeming" an unprocessed, unserved intake questionnaire to be a charge—will

both help avoid unnecessary confusion over the status of an intake questionnaire and ensure that the doctrine of exhaustion is observed.

B. Waiving A Plaintiff's Obligation To File A Charge Would Unduly Hamper Employer Efforts To Address And Resolve Workplace Misconduct Without Resort To Litigation

The decision below essentially allows an age discrimination plaintiff to surprise the employer with an ADEA lawsuit, thereby robbing the employer of the opportunity to address workplace disputes without resort to expensive and time-consuming litigation. "The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)). As this Court observed in *McKennon*, "Congress designed the remedial measures in these statutes to serve as a spur or catalyst to cause employers to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of discrimination." *Id.* (citation and internal quotations omitted).

An employer managing an EEOC charge investigation has a strong interest in resolving the dispute early, not only to conserve resources but also to preserve the relationship between the company and the charging party, particularly if the individual is a current employee. Meaningful efforts to conciliate a discrimination charge by the EEOC, who is an "outsider" to the dispute, certainly serves the agency's aim of preventing and correcting alleged discrimination. Early resolution with the EEOC's assistance also may help to repair an employer-employee relationship that now may be merely strained, but may be destroyed irretrievably by the acrimony and scorched earth tactics of litigation. Timely processing

and resolution is especially important in age discrimination actions, where lengthy proceedings are "particularly prejudicial to the rights of 'older citizens to whom, by definition, relatively few productive years are left.'" *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 757 (1979) (citing 113 Cong. Rec. 7076 (1967)) (remarks of Sen. Javits).

Moreover, exhaustion serves the interest of the judiciary in preventing a log jam of employment discrimination suits that, if properly attended to by the EEOC, could be resolved successfully at the administrative level in an efficient and expeditious manner. Allowing ADEA plaintiffs to proceed to court without first having taken the appropriate steps to accomplish an actual charge filing will almost certainly lead to an increase in litigation and corresponding burden on the court system.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully request that the Court grant the Petition for Writ of Certiorari.

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

United States District Court for the
Southern District of New York (Foley Square)

1:02-cv-03355

Holowecki, et al v. Federal Express

04/30/2002	1	COMPLAINT filed. Summons issued and Notice pursuant to 28 U.S.C. 636(c). FILING FEE $ 150.00 RECEIPT # 437780. (dle) (Entered: 05/02/2002)
04/30/2002		Magistrate Judge Ronald L. Ellis is so designated. (dle) (Entered: 05/02/2002)
06/03/2002	2	WAIVER OF SERVICE of S&C returned executed as to Federal Express mailed on 5/17/02. Answer due on 7/16/02 for Federal Express. (sac) (Entered: 06/11/2002)
07/18/2002	3	RULE 1.9 CERTIFICATE filed by Federal Express. (sb) (Entered: 07/19/2002)
07/18/2002	4	NOTICE OF MOTION by Federal Express for an Order dismissing the Complaint in its entirety purs. to Rule 12(b) of the FRCP and awarding Defendant its costs, disbursements and reasonable attorneys' fees for having to bring this motion and defend this frivolous

		lawsuit . No Return Date. (sb) (Entered: 07/19/2002)
07/18/2002	5	MEMORANDUM OF LAW by Federal Express in support of [4-1] motion for an Order dismissing the Complaint in its entirety purs. to Rule 12(b) of the FRCP and awarding Defendant its costs, disbursements and reasonable attorneys' fees for having to bring this motion and defend this frivolous lawsuit. (sb) (Entered: 07/19/2002)
07/18/2002	6	AFFIRMATION of Traycee Ellen Klein by Federal Express in Support of [4-1] motion for an Order dismissing the Complaint in its entirety purs. to Rule 12(b) of the FRCP and awarding Defendant its costs, disbursements and reasonable fees for having to bring this motion and defend this frivolous lawsuit. (sb) (Entered: 07/19/2002)
08/01/2002	7	JOINT STIPULATION and ORDER EXTENDING TIME FOR RESPONSES, that the date for the plaintiff's to file their opposition to the [4-1] motion of defendant to dismiss the Complaint shall be extended to and including 8/6/02 , and, that the time for defendant's reply brief shall be extended to and including 8/20/02. (signed by Judge Lawrence M. McKenna) (tp) (Entered: 08/05/2002)

08/06/2002	8	MEMORANDUM OF LAW by Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, Nancy Thompics in opposition to [4-1] motion for an Order dismissing the Complaint in its entirety purs. to Rule 12(b) of the FRCP and awarding Defendant its costs, disbursements and reasonable attorneys' fees for having to bring this motion and defend this frivolous lawsuit. (sac) (Entered: 08/12/2002)
08/13/2002	9	NOTICE OF MOTION by Federal Express for an Order, pursuant to Local Rule 1.3(c) granting Carl K. Morrison admission to appear pro hac vice on behalf of defendant FedEx Corp. Return Date not indicated. Affirmation of Traycee Ellen Klein is attached. (tp) (Entered: 08/15/2002)
08/13/2002	10	AFFIDAVIT of Carl K. Morrison by Federal Express in support of [9-1] motion for an Order, pursuant to Local Rule 1.3(c) granting Carl K. Morrison admission to appear pro hac vice on behalf of defendant FedEx Corp. (tp) (Entered: 08/15/2002)
08/14/2002	11	NOTICE of FILING of signed Declaration of George Robertson by Paul Holowecki,

		Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, Nancy Thompics. (sb) (Entered: 08/16/2002)
08/14/2002	12	DECLARATION of George Robertson by Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, Nancy Thompics. (sb) (Entered: 08/16/2002)
08/16/2002	13	ORDER granting defendant's [9-1] motion for the admission pro hac vice of Carl K. Morrison to appear on behalf of Federal Express Corp.. (signed by Judge Lawrence M. McKenna); Copies mailed. Document sent to attorney admissions clerk. (dle) Modified on 08/19/2002 (Entered: 08/19/2002)
08/21/2002	14	REPLY MEMORANDUM by Federal Express in support re: [4-1] motion for an Order dismissing the Complaint in its entirety purs. to Rule 12(b) of the FRCP and awarding Defendant its costs, disbursements and reasonable attorneys' fees for having to bring this motion and

		defend this frivolous lawsuit. (gf) (Entered: 08/26/2002)
08/21/2002	15	SUPPLEMENTAL DECLARATION of Carl K. Morrison by Federal Express Re: [4-1] motion for an Order dismissing the Complaint in its entirety purs. to Rule 12(b) of the FRCP and awarding Defendant its costs, disbursements and reasonable attorneys' fees for having to bring this motion and defend this frivolous lawsuit. (gf) (Entered: 08/26/2002)
08/23/2002	16	Letter filed by Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, Nancy Thompics addressed to Clerk of Court from David L. Rose, dated 8/22/02, re: Defendant's pending Motion to Dismiss. (sb) (Entered: 08/28/2002)
08/29/2002	17	Memo endorsed on motion; granted. Mr. David L. Rose is admitted pro hac vice . (signed by Judge Lawrence M. McKenna); Copies mailed. (Sent to the Attorney Admissions Clerk). (kw) (Entered: 09/04/2002)
10/09/2002	18	ORDER; For the reasons set forth in this order the court grants Federal Express's [4-1] motion for an Order dismissing the

plaintiffs' ADEA claims, without leave to replead. Because the Court dismissed plaintiffs' federal claims, it declines to exercise jurisdiction over plaintiffs state law claims. Complaint dismissed. (signed by Judge Lawrence M. McKenna); Copies mailed to counsel. Document sent to judgment clerk. (dle) Modified on 10/23/2002 (Entered: 10/15/2002)

10/23/2002 19 JUDGMENT. ORDERED, ADJUDGED AND DECREED: that for the reasons stated in the Court's Memorandum and Order dtd 10/8/02, deft's motion to dismiss pltff's ADEA claims is hereby granted without leave to replead and the Court declines to exercise jurisdiction over the state law claims. (Signed by James M. Parkison, Clerk of Court); Mailed copies and notice of right to appeal. Entered On Docket: 10/25/02. (kg) (Entered: 10/25/2002)

10/23/2002 Case closed. (kg) (Entered: 11/04/2002)

10/24/2002 20 NOTICE OF MOTION by Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, Nancy Thompics to alter or amend the Memorandum and Order of 10/9/02 . No Return Date. (gq) (Entered: 10/31/2002)

10/24/2002	21	MEMORANDUM OF LAW by Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, Nancy Thompics in support of [20-1] motion to alter or amend the Memorandum and Order of 10/9/02. (gq) (Entered: 10/31/2002)
11/07/2002	22	RESPONSE by Federal Express to [20-1] motion to alter or amend the Memorandum and Order of 10/9/02 (db) (Entered: 11/14/2002)
11/19/2002	23	REPLY MEMORANDUM by Paul Holowecki, et al. in support re: [20-1] motion to alter or amend the Memorandum and Order of 10/9/02 (sac) (Entered: 11/21/2002)
05/04/2004	24	ORDER re: [20] Motion to Amend/Correct filed by Phyllis Nelson, Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, Nancy Thompics. Motion denied. So Ordered. (Signed by Judge Lawrence M. McKenna on 5/4/04) (jco,) (Entered: 05/05/2004)

06/04/2004	25	NOTICE OF APPEAL from [24] Order,. Document filed by Steven Almendarez, Paul Holowecki, Patricia Kennedy, Andy Kubicki, Donna M. Lewis, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Charles Moncalieri, Kenneth G. Mutchler, Phyllis Nelson, George Robertson, Nancy Thompics, Elizabeth Tucker. Filing fee $ 255.00, receipt number E511815. Copies of Notice of Appeal mailed to Attorney(s) of Record: Carl Morrison, Esq. (dt,) (Entered: 06/14/2004)
06/14/2004		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: [25] Notice of Appeal,. (dt,) (Entered: 06/14/2004)
06/14/2004		Transmission of Notice of Appeal to the District Judge re: [25] Notice of Appeal. (dt,) (Entered: 06/14/2004)
09/14/2004	26	USCA SCHEDULING ORDER as to [25] Notice of Appeal, filed by Phyllis Nelson, Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, Nancy Thompics USCA Case Number 04-3376-cv. Roseann B. MacKechnie, Clerk USCA. Certified: 8/30/04. Appeal Record due by 10/5/2004. Appellant Brief

		due by 10/12/2004. Appellee Brief due by 11/12/2004. (tp,) (Entered: 09/14/2004)
09/14/2004		USCA Case Number 04-3376-cv from the U.S.C.A. 2nd Cir. assigned to [25] Notice of Appeal, filed by Phyllis Nelson, Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, Nancy Thompics. (tp,) (Entered: 09/14/2004)
11/03/2004	27	Appeal Record Sent to USCA (Index). Notice that the Original index to the record on Appeal for [25] Notice of Appeal, filed by Phyllis Nelson, Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, Nancy Thompics USCA Case Number 04-3376-cv, 3 Copies of the index, Certified Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (pr,) (Entered: 11/03/2004)

* * *

United States Court of Appeals for the Second Circuit
04-3376-cv

Holowecki v. Federal Express

6/16/04	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , filed. Forms C and D due on 6/18/04. [Entry date Jul 8 2004] [EA]
6/16/04	Copy of receipt re: payment of docketing fee filed on behalf of APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , <Receipt #: E-511815. [Entry date Jul 8 2004] [EA]
7/20/04	Notice of appeal acknowledgment letter from Carl Morrison received. [Entry date Jul 23 2004] [CI]
7/21/04	APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizaoeth Tucker, ET AL , defective motion to file late filed. Notice sent to party to correct by 7/30/04. [Entry date Jul 26 2004] [EA]
7/21/04	Appellant Paul Holowecki, Appellant Patricia Kennedy, Appellant Donna Lewis, et al motion extend time to file C & D filed with proof of service. [Entry date Aug 3 2004] [EA]

8/3/04 APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , defective motion to file forms C and D late CURED. [Entry date Aug 3 2004] [EA]

8/4/04 APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , Form C filed, with proof of service. [Entry date Aug 6 2004] [EA]

8/4/04 APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , Form D filed, with proof of service. [Entry date Aug 6 2004] [EA]

8/4/04 Order FILED GRANTING motion extend time to file C & D by Appellant Paul Holowecki, Appellant Patricia Kennedy, Appellant Donna Lewis, Appellant Charles Moncalieri, Appellant Phyllis Nelson, Appellant Andy Kubicki, Appellant Elizabeth Tucker, Appellant Steven Almendarez, Appellant Frank Martinez, Appellant Kelly Martinez, Appellant Kevin McQuillan, Appellant Kenneth Mutchler, Appellant George Robertson, Appellant Nancy Thompics, endorsed on motion dated 7/21/2004.(SB) Extended Form C due is 8/4/2004. Extended Form D due is 8/4/2004. [Entry date Aug 6 2004] [EA]

8/6/04 Notice to counsel in re: Granted motion to file forms C and D late. [Entry date Aug 6 2004] [EA]

8/30/04	Pre-Argument Notice and Order from Stanley A. Bass Filed. Scheduled For: 9/21/04 @3:00p.m. [Entry date Aug 31 2004] [AM]
8/30/04	Scheduling order #1 filed. Record on appeal due 10/5/2004. Appellants brief due 10/12/2004. Appellees brief due 11/12/2004. Ready week 12/20/2004. (SB) [Entry date Aug 31 2004] [AM]
9/13/04	Letter dated 9/9/04 from Carl K. Morrison, N/A for argument 1/6/05; week of 1/14/05; 2/10/05; week of 3/14/05; week of 3/21/05; 6/24/05, the weeks of July 5,9, &11, 2005, received [Entry date Sep 16 2004] [EA]
9/21/04	First pre-argument conference held by SB. [Entry date Sep 21 2004] [DP]
9/22/04	Scheduling order #2 filed. Record on appeal due 11/5/2004. Appellants brief due 11/12/2004. Appellees brief due 12/13/2004. Ready week 1/24/2005. (SB) [Entry date Sep 28 2004] [EA]
9/28/04	Notice to counsel in re: Scheduling order #2 filed. [Entry date Sep 28 2004] [EA]
11/3/04	Record on appeal index in lieu of record filed. [Entry date Nov 15 2004] [EA]
11/16/04	APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , brief RECEIVED.(Problem: pending

motion to file briefs late) [Entry date Nov 17 2004] [EA]

11/16/04 Joint appendix received. APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , [Entry date Nov 17 2004] [EA]

11/16/04 APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , brief FILED with proof of service. [Entry date Nov 18 2004] [EA]

11/16/04 APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , joint appendix filed w/pfs. [Entry date Nov 18 2004] [EA]

11/16/04 Appellant Paul Holowecki, Appellant Patricia Kennedy, Appellant Donna Lewis, et al motion file late brief filed with proof of service. [Entry date Nov 17 2004] [EA]

11/17/04 Order FILED GRANTING motion file late brief by Appellant Paul Holowecki, Appellant Patricia Kennedy, Appellant Donna Lewis, Appellant Charles Moncalieri, Appellant Phyllis Nelson, Appellant Andy Kubicki, Appellant Elizabeth Tucker, Appellant Steven Almendarez, Appellant Frank Martinez, Appellant Kelly Martinez, Appellant Kevin McQuillan, Appellant Kenneth Mutchler, Appellant George Robertson, Appellant Nancy Thompics, endorsed on motion dated 11/16/2004. IT IS HEREBY ORDERED that

	the motion by appellant to file brief and appendix two business days late on Nov. 16, 2004 is GRANTED. Appellee`s brief is due no later than Dec. 16, 2004. The appeal may be heard as early the week of Jan. 31, 2005.(TWY) [Entry date Nov 18 2004] [EA]
11/18/04	Notice to counsel in re: Granted motion to file briefs late. [Entry date Nov 18 2004] [EA]
12/14/04	Appellee Federal Express Corporation motion extended time(to file briefs) filed with proof of service. [Entry date Dec 16 2004] [EA]
12/17/04	Order FILED GRANTING motion extended time by Appellee Federal Express Corporation, endorsed on motion dated 12/14/2004 Extended Appellees brief due is 1/24/2005. Extended Ready week is 3/7/2005. (TWY) [Entry date Dec 21 2004] [EA]
12/21/04	Notice to counsel in re: Appellee's granted motion for extension of time. [Entry date Dec 21 2004] [EA]
12/22/04	Notice of appearance form on behalf of R. Kelsey , Esq., filed. (Orig in acco, copy to Calendar) [Entry date Dec 30 2004] [EA]
12/22/04	Letter dated 12/21/04 from R. Jeffrey Kelsey, Esq., N/A for argument Feb. 7-11, 2005; Feb. 26- March 6, 2005; March 7-11, 2005; and March 31-April, 2005 received [Entry date Dec 30 2004] [EA]

12/27/04	APPELLEE Federal Express Corporation, brief filed with proof of service. [Entry date Dec 30 2004] [EA]
1/30/05	APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , reply brief filed with proof of service. [Entry date May 4 2005] [EA]
3/21/05	Proposed for argument the week of 05/23/05 [Entry date Mar 21 2005] [CA]
4/8/05	Set for argument on May 24, 2005. [Entry date Apr 8 2005] [AG]
5/24/05	Case heard before KEARSE, CALABRESI, POOLER, C.JJ CD DATE: 5/24/05 [Entry date May 24 2005] [RD]
8/29/05	Record on appeal filed. (Original papers of district court.) Number of Volumes: 1. [Entry date Aug 29 2005] [SH]
3/8/06	Judgment of the district court is Reversed in part, Vacated in part, and Remanded by published signed opinion filed. (RSP) [Entry date Mar 8 2006] [EA]
3/8/06	Judgment filed. [Entry date Mar 8 2006] [EA]
3/8/06	Notice to counsel in re: Opinion filed. [Entry date Mar 8 2006] [EA]
3/20/06	APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker,

ET AL , bill of cost filed. Notice sent to party to correct by 3/27/06. (missing printers bill and certificate of service) [Entry date Mar 21 2006] [AM]

3/20/06 APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , itemized and verified bill of costs received, w/pfs. [Entry date Apr 11 2006] [EA]

3/22/06 Appellee Federal Express Corporation Petition for rehearing and petition for rehearing en banc filed with proof of service. [Entry date Mar 24 2006] [AM]

3/23/06 APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , defective document cured. Note: bill of costs corrected [Entry date Apr 11 2006] [EA]

3/24/06 Note: The OPINION PRICE is $4.00 [Entry date Mar 24 2006] [CK]

5/2/06 Order filed stating that the motion to tax costs (bill of costs construed as motion) is GRANTED. (Before: ALK, GC, RSP, C.JJ., By: TY) [Entry date May 2 2006] [AM]

5/2/06 APPELLANT Andy Kubicki, Charles Moncalieri, Donna Lewis, Elizabeth Tucker, ET AL , statement of costs taxed in the amount of $1,989.52 filed. [Entry date May 2 2006] [AM]

5/2/06	Notice to counsel in re: Orders filed 5/2/06. [Entry date May 2 2006] [AM]
10/31/06	Order FILED DENYING motion Petition for rehearing by Appellee Federal Express Corporation, endorsed on order dated 10/31/06, Order FILED DENYING motion petition for rehearing en banc by Appellee Federal Express Corporation, endorsed on order dated 10/31//2006.(AH) [Entry date Nov 1 2006] [EA]
11/1/06	Notice to counsel in re: Denied petition for rehearing and rehearing en banc. [Entry date Nov 1 2006] [EA]
11/22/06	Judgment MANDATE ISSUED. CLOSED [Entry date Nov 22 2006] [EA]
11/28/06	Acco received in records room from team. [Entry date Nov 28 2006] [DR]
11/29/06	Mandate receipt returned from the district court. [Entry date Dec 4 2006] [DR]
1/30/07	Notice from Supreme Court granting APPELLEE Federal Express Corporation, extension of time in which to file a writ of certiorari received. [Entry date Feb 2 2007] [EA]
4/9/07	Notice of filing petition for APPELLEE Federal Express Corporation, dated 4/3/07 filed. Supreme Court #: 06-1322. [Entry date Apr 11 2007] [EA]

6/7/07	Writ of Certiorari GRANTED [Entry date Jun 8 2007] [EA]
7/12/07	Letter received from Karen D. Mcneil requesting copy of oral argument tape. Receipt # 188743. Forwarded ro calendar. [Entry date Jul 12 2007] [DR]
7/20/07	Record on appeal RETURNED to lower court (1 of 1 vol.) 500 Pearl Street. [Entry date Jul 20 2007] [RL]
7/31/07	Oral argument tape mailed to Karen McNeil [Entry date Aug 1 2007] [RD]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 02 CV 3355

[Received April 30, 2002]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin MeQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Thompics, individually and on behalf of all others similarly situated,	)
Plaintiffs,	)
v.	)
Federal Express Corporation,	)
Defendant.	)

JURY DEMAND

COMPLAINT

1. This suit is brought to obtain and secure rights granted by the Age Discrimination in Employment Act, as amended, 29 U.S.C. §§ 621 et seq. ("ADEA"), the New York Human Rights Law ("NYHRL"), and other state laws that prohibit discrimination on grounds of age.

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343, I367 and 29 U.S.C. §§ 216(b) and 628(b) and venue pursuant to 28 U.S.C. § 1391(c).

PARTIES

3. The defendant Federal Express Corporation ("Federal Express") is a corporation engaged in the transportation of packages by air and ground in New York and throughout the United States and elsewhere. The headquarters of Federal Express is in Memphis, Tennessee.

4. Federal Express employs more than 100,000 people in the United States, at more than 3,000 stations, than 45,000 of whom who drive trucks and pick up and deliver packages to and from businesses and residences in the United States. Such employees are called express couriers (hereafter "couriers").

5. Defendant is an employer within the definition and coverage of the ADEA, 29 U.S.C. § 630(b). Defendant is an employer within the definition and coverage of the New York Human Rights Law and other state laws that prohibit discrimination on grounds of age.

6. Plaintiffs are employees or former employees of Federal Express who are or were employed by Federal Express as couriers and who are 40 years of age and have had more than ten years of experience with Federal Express as couriers. Plaintiffs bring this suit on behalf of themselves and on behalf of other similarly situated Federal Express couriers.

FACTUAL ALLEGATIONS

7. At all material times, Federal Express has made written and other pledges of "Guaranteed Fair Treatment to couriers and to its other employees, and Federal Express had promised that it would provide couriers with fair and non-discriminatory treatment, without favoritism.

8. At all material times Federal Express assured couriers in writing that each of them could be assured of a job at Federal Express "if I do a good job."

9. Federal Express provides as part of its compensation to couriers and other employees a health plan that assures assistance in the payment of medical expenses, drug prescriptions and dental expenses. It promises Medical Absence Pay and Short-Term and Long Term disability benefits if the employee is sick or injured and unable to work. Federal Express provides a pension plan, and has a profit sharing plan, a retirement saving plan, and an optional saving plan. For a courier who earned $33,893 in gross pay including overtime in 1994, Federal Express estimated in a booklet distributed to the courier that the fringe benefits package for 1994 cost it $15,161.

10. By 1994, each of the plaintiffs had become an efficient full time couriers who met or exceeded Federal Express' guidelines for good production and performance by couriers. Each of them had received excellent or good performance evaluations from the time they were hired as couriers until at least that year.

11. From the time they were hired as couriers until sometime in 1994, Federal Express treated the named

plaintiffs and other similarly situated couriers who were more than 40 years old no differently than younger couriers.

12. In 1994, Federal Express began to adopt practices and policies that were intended to and did operate to reduce the number and percentage of couriers over the age of forty (hereafter frequently "older couriers") by treating them less favorably than younger couriers, both "part time" and full time. These practices and policies were intended to require and encourage the termination of the employment relationship between Federal Express and older couriers before the older couriers wished to retire. Federal Express published some of the policies throughout its establishments. Federal Express kept some of the new policies and practices clandestine, particularly those involving the targeting of older couriers for harassment, discipline and discouragement, so that some would be fired and others would leave because of the harassment and pressure.

13. In November 1994, Federal Express adopted as part of the program described in paragraph 12 above, a compensation system called "Best Practices Pays" ("BPP"). Federal Express described BPP as an incentive contest between stations meeting or exceeding station budget goals. At approximately the same time, Federal Express adopted "Minimum Acceptable Performance Standards" ("MAPS").

14. BPP and MAPS became in fact a new compensation system that Federal Express used to favor new, young couriers, and to force or encourage plaintiffs and other older, experienced couriers to leave their employment with Federal Express.

15. Under the policies and procedures adopted in 1994 and 1995, Federal Express gave managers and other supervisors

lists of older couriers who were to be targeted for increased supervision, discipline, harassment and for termination if some cause could be established. Under these policies and procedures, Federal Express gave older couriers who were injured or who otherwise required medical absences intense scrutiny and harassment and found reasons to discharge many of them from employment. Under these policies and procedures, Federal Express discharged a disproportionately high percentage of older couriers (as compared to younger couriers), and discharged an even higher percentage of older couriers who had been injured on the job or otherwise required medical absences.

16. Under the policies and practices described above, Federal Express gave young, inexperienced couriers, including so called "part time" couriers who often worked on a full time or more than full time basis, preference in starting times, in overtime assignments, and in route assignments over older, more experienced couriers, and particularly those on the target lists.

17. Prior to the new compensation system described above, Federal Express did not count (as unauthorized leave) absences from work due to temporary disability caused by job related or other injury or illness. With the adoption of the BPP and MAPS system, however, Federal Express treated all absences from work as creating an attendance problem, leading to discipline and possible discharge, including absences due to on the job injuries, other serous injuries and other medical problems beyond the control of the couriers. As part of the new system, Federal Express introduced a new "30 day/90 day Courier Route and Station" assignment policy. Under that policy, any absence of more than 30 days, including absences due to on the job injuries and other medical problems, became grounds for losing a regular route

assignment. Similarly, under that policy, any absence of more than 90 days became grounds for removal of the courier's full or part-time station slot—that is, loss of employment with Federal Express. Other devices, including so called knowledge tests, were adopted and used to discriminate against older couriers in favor of younger couriers. Under the policies described above, Federal Express treated older couriers less favorably than younger couriers, and fired older couriers more frequently and in larger proportions than younger couriers, and encouraged older couriers to leave rather than be terminated.

18. Under the BPP check-ride format stated by Federal Express, each courier was to agree with his supervisor upon a reasonable and safe number of stops per hour on the courier's route that could reasonably be achieved by the courier. At first, the number of stops was a goal which would result in enhanced pay for one pay period for one station in a geographical area, if achieved. Over time, however, Federal Express treated the goals as the minimum acceptable number of stops that older couriers were required to make to retain their positions. Under the BPP check-ride format as implemented, failure of a courier to achieve that number was grounds for a "performance reminder" and then disciplinary action up to and including termination. While older couriers were written up for infrequent and occasional failures to meet the goals, or for error, in delivering packages, younger couriers were rarely disciplined for such matters.

19. Upon information and belief, Federal Express adopted the policies and procedures described above in paragraphs 12-18 to encourage or require a disproportionate share of older couriers to leave its employment before they became eligible for their retirement. Federal Express believed that elimination of older couriers from its work force would

reduce its hourly labor costs and the costs of its health and medical benefits, retirement program, and other fringe benefits. Federal Express intended the new procedures to reduce the regular and overtime pay for older, more experienced couriers, as compared to younger part time and full time couriers, and reduce costs of the other benefits for older couriers, and to cause the disproportionate termination of employment of older couriers.

20. In 1994 and thereafter, Federal Express held meetings of managers and other supervisors throughout the United States in order to implement the new discriminatory practices and procedures. Federal Express utilized a booklet entitled "High-Velocity Culture Change: a Handbook for Managers" to train managers to implement the new program. At those meetings, the managers were advised that older couriers were more likely to sustain injuries and be absent for long periods of time, and that their presence in the work force detracted from the ability of Federal Express to compete in the marketplace.

21. At these meetings, managers were told that if any manager did not think that he or she could do what was being asked of them under the new policies, he or she should leave Federal Express or step down from a management position to a courier position. At the meetings, Federal Express also told those managers that if they could not do what was asked of them, the company would find someone who could. Under the BPP program and other policies and procedures described above, Federal Express fired or displaced older managers disproportionately and replaced them with younger managers who supported the new procedures and practices.

22. Federal Express used the BPP and Station Review Process to allocate pay away from older more experienced

couriers to newer, younger couriers, and to provide a systematic basis for terminating and intimidating the older couriers and favoring newer, younger couriers, who in fact were no more efficient or productive than the older couriers.

23. Federal Express has followed from some time in 1994 and each year thereafter a pattern or practice of employment procedures that discriminate because of age against plaintiffs and other similarly situated experienced couriers over 40 years of age, and in favor of less experienced younger couriers. The discriminatory employment practices of Federal Express include: a) redistributing overtime and regular hours from older couriers to younger couriers; b) increasing the productivity goals for older couriers, without similar increases for younger couriers; c) requiring check rides for older couriers and criticizing their performance, while letting younger couriers go without check rides, or with fewer check rides; d) writing up older couriers for alleged violations of rules, while ignoring similar or more severe violations of such rules by younger couriers; e) treating three unrelated disciplinary letters as reason for terminating couriers, rather than only three disciplinary letters concerning the same problem, and increasing the length of time that each letter stayed in the personnel file from six months to one and a half years; f) holding required meetings for older couriers, but not for younger couriers, and by advising those attending to find another job because they would not be retiring from Federal Express; g) advising some older couriers directly that it was their age that was causing their problems at Federal Express; h) changing the policy of Federal Express concerning on the job injuries, so that absenteeism from on the job injuries could result in termination for cause; i) terminating older couriers for "cause" for minor infractions or for no infractions of the rules while favoring younger employees in such matters, and j) disciplining or terminating older couriers for failure to meet

productivity goals, and then giving their route, to a younger courier with reduced stops per hour or dividing the route into two new routes each with fewer stops per hour than the route for the older courier.

24. Employment practices that discriminate against older couriers and favor younger couriers, as described above, are the prevailing pattern or practice of Federal Express in the United States; this pattern or practice is not limited to one region or district or state. On information and belief, Federal Express has continued to follow that pattern or practice to the present, and has no plans to end that pattern or practice.

25. Federal Express' pattern or practice of discriminating against older couriers and in favor of younger couriers has become the rule and not the exception at Federal Express.

26. Federal Express has engaged in employment practices that harmed plaintiffs and other similarly situated employees over that age of 40. Those practices resulted in the termination of the employment of some plaintiffs and other members of the class they represent, and by the loss of income and other benefits and by otherwise disadvantageous terms and conditions of employment to plaintiffs and the class they represent.

27. The practices described in paragraphs 12-26 above were not consistent with business necessity.

28 Defendant has since at least May, 1995 been the subject of numerous charges of age discrimination filed with the Equal Employment Opportunity Commission, including charges by couriers of the age and experience of plaintiffs.

29 Federal Express was placed on notice of the allegations that it was discriminating on the basis of age against couriers over the age of 40 pursuant to the age discriminatory practices described in paragraphs 12 through no later than May, 1995, by EEOC Charge # 151951501, fried by Jack Haneline II. Some of the Plaintiffs in this case timely notified the EEOC of the discriminatory practices by Federal Express against older couriers on grounds of age more than 60 days before this date.

30. Individuals who met all of the prerequisites to filing suit required by the ADEA and by state law filed suit alleging a pattern or practice of age discrimination in employment against older workers in Florida, on October 26, 1999, based upon charges filed with state agencies and EEOC in 1996. *Freeman et al. v. Federal Express*, No. 99-2466 (M.D. Fla.). Many of the Plaintiffs in this case attempted to join that suit in March, 2001. That suit was terminated on procedural grounds on or about March 28, 2002. As a result of the Freeman case and prior charges Federal Express has been on notice continuously since May, 1995, of the allegations of age discrimination in employment.

30. Unless restrained by order of this Court, the defendant will continue to pursue policies and practices that are the same, or similar or related to the policies and practices alleged in this Complaint. Such policies and practices have caused plaintiffs and other couriers similarly situated irreparable harm.

COUNT I
CLAIMS UNDER THE ADEA

31. Defendant purposefully engaged in the practices described above in paras. 12-25 with full knowledge that they

discrirninated against older couriers. Defendant Federal Express engaged in the discriminatory employment practices that harmed plaintiffs and other similarly situated employees with disregard for their rights under the ADEA and with disregard for the provisions of state law prohibiting discrimination because of age.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray for orders requiring the defendant Federal Express to notify current couriers over 40 years old and those older couriers who were employed by Federal Express during the time period described in this suit of the pendency of this suit and the right of persons similarly situated to the plaintiffs to participate in this suit if they consent to do so;

WHEREFORE the plaintiffs further pray for an order preliminarily and permanently enjoining defendant Federal Express and its officers, agents, employees, successors and all persons in active concert or participation with it from engaging in employment practices that discriminate on the basis of age, and specifically from:

1) treating older couriers less favorably than younger couriers in the allocation of start times, routes and overtime opportunities;

2) terminating or disciplining couriers who are absent from work because of injuries or other medical problems while they are recovering from same, unless and until it becomes clear that they are permanently disabled from performing the duties of a courier; and

3) treating older couriers less favorably than younger couriers in discipline and other terms and conditions of employment; and

4) failing or refusing to reinstate to their prior position as couriers the plaintiffs and opt in plaintiffs who were terminated or who left the employment of Federal Express because of the discriminatory practices described above, with seniority and fringe benefits in a manner that makes them whole for the loss of employment that they have suffered; and

WHEREFORE Plaintiffs further pray for:

a) an award of damages to them for the loss of income they have suffered, including the loss of fringe benefits, and loss of future earnings for those couriers who have lost their positions with Federal Express until such time as they have been reinstated or offered reinstatement;

b) pre- and post judgment interest;

c) liquidated damages to the extent permitted by law;

d) costs of litigation including attorney's fees and expert witness fees; and

e) such other relief as may be just and proper.

COUNT II

CLASS ACTION CLAIMS UNDER STATE ANTI-DISCRIMINATION LAWS

32. The allegations of paragraphs 1-31 above are hereby incorporated by reference.

CLASS ACTION ALLEGATION

33. There are hundreds of couriers employed by Federal Express who are similarly situated to the plaintiffs in this case who are employed in New York. The practices alleged in paragraphs 1-31 are unlawful under the New York Human Rights Law. Such practices are also unlawful under state law in California, Florida, Illinois, Michigan and New Jersey and in other states. Plaintiffs represent similarly situated couriers for similar claims in other states that have similar laws prohibiting age discrimination in employment, including, but not limited to, California, Michigan, New Jersey, and New York.

35. Plaintiffs have exhausted administrative remedies under the New York Human Rights Act and the Florida Civil Rights Act, and in several other states.

36. Defendant employs 45,000 couriers nationwide. Plaintiffs seek to represent all such couriers over 40 years of age who work in the states of New York, California, Michigan, New York, or New Jersey, and in other states which prohibit age discrimination in employment, and have laws similar to the ADEA and the NYHRL.

37. The claims of the named plaintiffs and of other older couriers share common questions of fact, and common questions of law under state law, including whether Federal Express intentionally engaged in a pattern or practice of age discrimination against older couriers by adopting company-wide employment practices that were intended to, and did in fact result in driving older couriers out of employment as couriers of defendant Federal Express; and whether Federal Express engaged in policies and practices

that discriminated against couriers over 40 years of age that were not required by or consistent with business necessity.

38. Plaintiffs' claims are typical of the age discrimination claims of the class they will seek to represent. Plaintiffs include current couriers who have been harassed and discriminated against in the terms and conditions of their employment, former couriers wrongfully terminated by Federal Express, and former couriers compelled to resign as couriers by Federal Express. Plaintiffs all claim that Federal Express intentionally engaged in a pattern or practice of age discrimination against older couriers by adopting company-wide plans that were intended to and did drive older couriers out of the company disproportionately. The factual issues concerning liability under the state law claims are identical or similar to the issues concerning liability under the ADEA, as are the issues concerning loss of earnings, and the willfulness of the conduct of Federal Express.

39. Plaintiffs are adequate representatives of the class they will seek to represent because they have retained experienced counsel with a multi-state practice in age discrimination matters, collective actions and other employment discrimination matters. Because plaintiffs are not and were not supervisors there are no conflicts between their interests and the class they will seek to represent.

ALLEGATIONS PERTAINING TO DAMAGES

40. As a result of Defendant's actions, Plaintiffs have suffered, suffer, and will suffer humiliation, embarrassment, mental anguish, inconvenience, damage to reputation, and injury to professional standing.

41. Defendant acted with reckless disregard for Plaintiffs' civil rights.

PRAYER FOR RELIEF

WHEREFORE the Plaintiffs further pray for an order preliminarily and permanently enjoining defendant Federal Express and its officers, agents, employees, successors and all persons in active concert or participation with it from engaging in employment practices that discriminate on the basis of age, and specifically from:

1) treating older couriers less favorably than younger couriers in the allocation of start times, routes and overtime opportunities; and

2) terminating or disciplining couriers who are absent from work because of injuries or other medical problems while they are recovering from same, unless and until it becomes clear that they are permanently disabled from performing the duties of a courier,

3) treating older couriers less favorably than younger couriers in discipline and other terms and conditions of employment; and

4) failing or refusing to reinstate to their prior position as couriers the plaintiffs and opt in plaintiffs who were terminated or who left the employment of Federal Express because of the discriminatory practices described above, with seniority and fringe benefits in a manner that makes them whole for the loss of employment that they have suffered.

WHEREFORE Plaintiffs further pray for:

a) an award of loss of income to them and all other persons similarly situated for the loss of income they have suffered, including the loss of fringe benefits, and loss of future earnings for those couriers who have lost their positions with Federal Express until such time as they have been reinstated or offered reinstatement;

b) reinstatement with seniority and other fringe benefits as necessary to make them whole for those plaintiffs and members of the affected class who were terminated or who were left their employment because of the discriminatory policies of Federal Express;

c) compensatory damages for humiliation, pain and suffering, and other non-economic injuries;

d) punitive damages to the extent permitted by law;

e) costs of litigation including attorney's fees and expert witness fees;

f) pre- and post judgment interest; and

g) such other relief as may be just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

Respectfully submitted,

/s/
/s/

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02-CV-3355 (LMM)

[Filed July 18, 2002]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Thompics, individually and on behalf of others similarly situated, Plaintiffs,	)
- against -	)
FEDERAL EXPRESS CORPORATION, Defendant.	)

NOTICE OF MOTION TO DISMISS THE COMPLAINT

PLEASE TAKE NOTICE that upon the accompanying Memorandum of Law, the Affirmation of Traycee Ellen Klein, the Declaration of Carl K. Morrison and the Exhibits attached thereto, and all prior pleadings and proceedings in this action, defendant Federal Express Corporation, by its attorneys Epstein Becker & Green, P.C., will move this court before the Honorable Lawrence M. McKenna, United States District Judge, at the United States Courthouse, 500 Pearl Street, Courtroom 15D, New York, New York for an Order (i) dismissing the Complaint in its entirety pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, (ii) awarding Defendant its costs, disbursements and reasonable attorneys'

fees for having to bring this motion and defend this frivolous lawsuit, and (iii) for such other relief as this Court deems just and proper.

Pursuant to Rule 6.1(b) of the Local Civil Rules, opposing affidavits and answering memoranda, if any, must be served within ten business days.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02-CV-3355 (LMM)

[Filed July 18, 2002]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Thompics, individually and on behalf of others similarly situated, Plaintiffs,	)
- against -	)
FEDERAL EXPRESS CORPORATION, Defendant.	)

AFFIRMATION IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

TRAYCEE ELLEN KLEIN, being duly admitted to practice law before the United States District Court for the Southern District of New York and the Courts of the State of New York, affirms under the penalties of perjury as follows:

1. I am a partner at the law firm of Epstein Becker & Green, P.C., attorneys for defendant Federal Express Corporation ("FedEx"), and am fully familiar with the facts and circumstances of the matters set forth herein. I

respectfully submit this affirmation in support of FedEx's Motion to Dismiss the Complaint with Prejudice.

2. Attached to this affirmation is the Declaration of Carl K. Morrison, with Exhibits 1 through 11, which are the documents that FedEx relies on in support of its Motion to Dismiss the Complaint with Prejudice. These documents are referenced throughout FedEx's Memorandum of Law, which is submitted herewith.

3. Plaintiffs commenced this action pursuant to the Age Discrimination in Employment Act ("ADEA"). As demonstrated in FedEx's Memorandum of Law in Support of its Motion to Dismiss the Complaint, the plaintiffs do not have standing to bring this ADEA action. Of the fourteen named plaintiffs, only two filed charges with the Equal Employment Opportunity Commission ("EEOC"). Those two charges are untimely and cannot serve as a basis for this litigation. Since the two filing plaintiffs cannot properly commence this action, the twelve remaining plaintiffs also lack standing. Accordingly, FedEx respectfully requests that this Court grant Defendant's Motion to Dismiss the Complaint in its entirety, with prejudice.

Respectfully submitted this date of July 16, 2002.

/s/ _____

Traycee Ellen Klein (TK 2755)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02-CV-3355 (LMM)

[Filed July 18, 2002]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Thompics, individually and on behalf of others similarly situated, Plaintiffs,	)
- against -	)
FEDERAL EXPRESS CORPORATION, Defendant.	)

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INTRODUCTION

Plaintiffs, an array of current and former couriers employed by defendant Federal Express Corporation ("FedEx") in seven different states in various regions of the country, filed this age discrimination suit on April 30, 2002 challenging business decisions implemented by FedEx eight years ago. None of the named plaintiffs filed a charge of discrimination with the Equal Employment Opportuity Commission ("EEOC") that can serve as the administrative basis necessary to bring this action, and all of the claims are time-barred. For these reasons, the Complaint should be dismissed in its entirety with prejudice.

RELEVANT FACTS

1. Each of the fourteen named plaintiffs, with the exception of Nancy Thompics,[1] is a current or former courier employed by FedEx. (Complaint ("Comp."), ¶ 6).

2. Of the thirteen named plaintiffs for whom FedEx has a record of employment, two worked in different locations in New York, four worked at two different locations in California, two worked at different locations in Pennsylvania, two worked at different locations in Illinois, one worked in New Jersey, one works in Florida, and one works in Indiana. (Declaration of Carl Morrison ("Morrison Decl."), Ex. 1).

3. Of the thirteen named plaintiffs for whom FedEx has a record of employment, five are still employed by FedEx. (Morrison Decl., Ex. 1).

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[1] FedEx has no record of an employee named Nancy Thompics (Morrison Decl., ¶ 3.)

4. Three of the named plaintiffs voluntarily resigned—one in January, 2000, one in June, 2000, and one in April, 2001. (Morrison Decl., Ex. 1).

5. Two of the named plaintiffs were terminated for violation of the FedEx Acceptable Conduct policy—one in February 2000 and one over two years later in April 2002. (Morrison Decl., Exs. 1 and 2).

6. One of the named plaintiffs was terminated for violation of the FcdEx Medical Leave of Absence policy in September 2001. (Morrison Decl., Exs. 1 and 2).

7. One of the named plaintiffs was terminated for violation of the FedEx Performance Improvement policy in March 1998. (Morrison Decl., Exs. 1 and 2),

8. One of the named plaintiffs was terminated in September 2000 for failure to return to work following a medical leave. (Morrison Decl., Exs. 1 and 2).

9. Of the named plaintiffs, only two have ever filed charges of discrimination with the EEOC against FedEx—Kevin McQuillan and George Robertson (Morrison Decl., ¶¶ 5-7).

10. Kevin McQuillan filed a charge of discrimination with the EEOC alleging age discrimination on September 11, 1998. The EEOC found no cause to believe discrimination had occurred and issued a notice of right to sue on June 11, 1999. (Morrison Decl., Ex. 3).

11. George Robertson filed a charge of discrimination with the EEOC alleging age and disability discrimination on December 1, 2000. The EEOC dismissed the charge and

issued a notice of right to sue on April 25, 2001, stating that Robertson had failed to respond to requests for information or to cooperate with the investigation of his charge. (Morrison Decl., Ex. 4).

12. FedEx has no record of charges of discrimination being filed by any of the other named plaintiffs. (Morrison Decl., 7).

ARGUMENT

1. The Standards Applicable To This Motion

Defendant's motion is brought pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the grounds that plaintiffs have failed to demonstrate that they have met the statutory condition precedent to suit under the Age Discrimination in Employment Act ("ADEA"). In determining the sufficiency of plaintiffs' claims, the Court may consider the facts that appear on the face of the Complaint, matters of which judicial notice may be taken and documents either in plaintiffs possession or of which plaintiffs had knowledge and relied on in bringing suit. *See Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993); *Cortec Indus. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1561 (1992). As such, in determining this motion to dismiss, the Court may consider all of the exhibits referenced herein and attached to the Declaration of Carl Morrison, which is served and filed along with this Memorandum of Law and FedEx's Notice of Motion.

2. <u>The Complaint Must Be Dismissed Because None Of The Named Plaintiffs Filed A Timely Charge Of Discrimination That Can Serve As The Basis Of This Lawsuit.</u>

The ADEA requires an employee alleging age discrimination to file a charge of discrimination with the EEOC prior to bringing a lawsuit in Court. 29 U.S.C. § 626(d); *Dezaio v. New York Port Auth.*, 205 F.3d 62 (2d Cir. 2000). The purposes of the charge filing requirement are to notify the employer of the claims against it, to allow the EEOC to investigate and mediate claims of discrimination without the need for court action, and to encourage cooperation and voluntary compliance as the preferred means of achieving the goal of equal employment opportunity. *Streeter v. Joint Indus. Bd.*, 767 F. Supp. 520 (S.D.N.Y. 1991). In New York, charges must be filed within 300 days after the alleged unlawful practice occurred. *Miller v. IT&TCorp.*, 755 F.2d 20, 23 (2d Cir. 1985).

In addition to the requirement of filing a timely charge of discrimination, the ADEA establishes time limits for when a lawsuit alleging age discrimination must be brought:

> A plaintiff may commence an ADEA action in federal court: (i) as early as sixty days after filing a charge of discrimination with the EEOC, or (ii) as late as ninety days after receiving an EEOC right-to-sue notice.

Vollinger v. Merrill Lynch & Co., 198 F. Supp. 2d 433, 439 (S.D.N.Y. 2002) (*citing* 29 U.S.C. §§ 626(d)(e)). The 90-day filing requirement is akin to a statute of limitations. The Supreme Court has cautioned that the ADEA time limitations are to be strictly construed, and should not be disregarded by courts out of a vague sympathy for particular litigants. *Id.* at

440, *citing Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984). If the employee does not file the lawsuit within the 90-day time frame, his complaint is time-barred. *See Vollinger*, 198 F. Supp. 2d at 441.

The only exception to the administrative exhaustion requirements is the single filing rule, otherwise known as "piggybacking." The single filing rule, which applies in limited circumstances, permits a party who has not filed an administrative charge with the EEOC to participate in a lawsuit by piggybacking on the administrative charge of another party who has properly commenced suit. The Second Circuit has held that where the grievances in the complaint are alleged to arise throughout a large group, as is the case here, piggybacking may only occur if the underlying administrative charge gave indication that the grievance is defined broadly enough to include those who seek to piggyback on the claim. *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057-58 (2d Cir. 1990). In the case at bar, there is no charge of discrimination that can properly serve as the basis of this lawsuit. As such, the Complaint should be dismissed.

A. The Charges Of McQuillan And Robertson Are Time-Barred

In this case, only two of the named plaintiffs, McQuillan and Robertson, filed charges of discrimination with the EEOC, and both of these charges are time-barred. According to the Complaint, McQuillan, Robertson, and the other non-filing plaintiffs, are challenging policies adopted by FedEx in 1994 and 1995. (Comp., ¶¶ 12, 13, 15). McQuillan filed his charge on September 11, 1998, nearly four years after the implementation of the policies challenged in the lawsuit. Robertson filed his charge on December 1, 2000, over six years after plaintiffs claim the policies were

implemented. Since McQuillan and Robertson did not file their EEOC charges within 300 days of the alleged unlawful practice, as is required by the ADEA, their claims are time-barred.

In addition to missing the filing deadlines by several years, McQuillan and Robertson did not file this lawsuit within 90 days of their receipt of a right to sue notice from the EEOC. McQuillan's right to sue notice was issued on June 11, 1999, nearly three years prior to the filing of this suit. Robertson's right to sue notice was issued on April 25, 2001, just over a year prior to the filing of this action. Both missed their 90-day limit by substantial periods of time. Accordingly, the claims of McQuillan and Robertson are time-barred and should be dismissed with prejudice. *Vollinger, supra.*[2]

B. <u>There Is No EEOC Charge That Can Serve As The Basis To Piggyback</u>

The twelve other plaintiffs, Holowecki, Kennedy, Lewis, Moncalieri, Nelson, Kubicki, Tucker, Almendarez, Martinez, Martinez, Mutchler, and Thompics, did not file charges of discrimination with the EEOC. Thus, they may only join and participate in this lawsuit if there is an administrative charge onto which they may piggyback. As demonstrated above, the

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[2] Because McQuillan and Robertson filed charges of their own, they are not entitled to attempt to piggyback on someone else's charge. This is because the single filing rule does not apply to employees who actually filed EEOC charges. *Levy v. United States General Accounting Office*, No. 97 Cir. 4016, 1998 U.S. Dist. LEXIS 5567 at *9-10 (S.D.N.Y. Apr. 22, 1998) ("plaintiffs who actually filed administrative charges on their own behalf cannot use the single filing rule to evade the limitations period on filing ADEA actions in federal court").

two filing plaintiffs, McQuillan and Robertson, did not timely file their EEOC charges and did not timely commence this lawsuit. As such, the non-filing plaintiffs cannot maintain this action.

Not surprisingly, since the argument would be without merit, the non-filing plaintiffs do not even allege in the Complaint that they are using the McQuillan charge or the Robertson charge as the claim upon which they attempt to piggyback. Rather, they attempt to maintain this suit by piggybacking their claims onto the charges of Jack Haneline II and Gerald Freeman, individuals who are not even parties to this lawsuit. (Comp., ¶¶ 29, 30). Whether the court considers the non-timely charges of McQuillan and Robertson, the non-party charge of Haneline II, or the *Freeman* litigation, the result is the same: the plaintiffs cannot satisfy the single filing rule. As such, they must be dismissed from this action.

As stated above, the Second Circuit has held that where the grievances in the Complaint are alleged to arise throughout a large group, as is the case here, piggybacking may only occur if the underlying administrative charge gave indication that the grievance is defined broadly enough to include those who seek to piggyback on the claim. *Tolliver*, 918 F.2d at 1057-58. The Complaint asserts that the plaintiffs worked in various localities throughout the United States and that "in 1994 Federal Express adopted practices and policies called "Best Practice Pays" and "Minimum Acceptable Performance Standards" that were intended to and did operate to reduce the number and percentages of couriers over the age of forty by treating them less favorably than younger couriers." (Comp., ¶¶ 12-18) The Complaint further alleges that under these policies and procedures: older couriers were targeted for increased supervision, discipline, harassment and termination;

older couriers who were injured or out on medical leave were harassed and scrutinized; overtime and regular hours were redistributed from older to younger couriers so that pay was allocated away from older more experienced couriers to newer, younger couriers. (Comp., ¶¶ 15, 17, 21, 22). This pattern and practice of discrimination, according to plaintiffs, was "not limited to one region or district or state." (Comp., ¶ 24).

While the widespread grievances abound in the fifteen page Complaint, there is no indication or notice of these grievances in the charges of Robertson or McQuillan. The Robertson charge states that "I [Robertson] was employed at Respondent since 1984. As a result of a work place injury I became a person with a disability. My performance has always been excellent. In August 2000, Respondent refused to allow me to take my accrued leave. I was denied additional benefits to which I was entitled. On September 8, 2000 I was terminated." (Morrison Decl., Ex. 4) Robertson believed that the aforementioned grievance constituted age and disability discrimination. *Id.*

The McQuillan charge, like the Robertson charge, complains about individual discrimination. McQuillan grieved that he was terminated in March of 1998 and that the reason given for his termination was unsatisfactory performance. The sum and substance of the remaining portion of McQuillan's charge is that FedEx had an incentive bonus plan in which the employer and the employee were supposed to "mutually agree" on performance goals, that minimum standards that were not agreed to were enforced more stringently on senior employees, and that as a result of this his employment was terminated on March 31, 1998. Additionally, McQuillan claims that he believes that he always performed his job duties in a satisfactory manner and that the reason he was terminated

was because he was 43. McQuillan, who worked in Hicksville, New York, never mentions in his charge that anyone else over the age of 40, in New York or anywhere else in the United States, has also been terminated because of this "incentive bonus plan."

It is beyond dispute that the charges of Robertson and McQuillan: do not identify the "Best Practice Pays" and "Minimum Acceptable Performance Standards," do not allege that these policies were intended to and did operate to reduce the number and percentages of couriers over the age of forty by treating them less favorably than younger couriers; do not allege that older couriers throughout the United States were targeted for increased supervision, discipline, harassment and termination; do not allege that older couriers who were injured or out on medical leave were harassed and scrutinized; and do not allege that overtime and regular hours were redistributed from older to younger couriers so that pay was allocated away from older more experienced couriers to newer, younger couriers. The charges of Robertson and McQuillan did not alert the EEOC and FedEx of the broad scope of the allegations in the Complaint, and, accordingly the single filing rule cannot apply. The non-filing plaintiffs are barred from piggybacking onto Robertson's and McQuillan's EEOC charges, even if Robertson or McQuillan had timely commenced their civil actions with this Court, which they did not. *See Tolliver*, at 1057-58.

The non-filing plaintiffs, realizing that they cannot rely on the charges of McQuillan or Robertson to avoid dismissal of this suit, instead rely on an EEOC charge that was filed in May of 1995 by Jack Haneline II and a previously filed and dismissed lawsuit in Florida entitled *Freeman et al. v. Federal Express*. (Comp.,¶¶ 29, 30). Like the McQuillan and

Robertson charges, these charges cannot be used to satisfy the single filing rule.

First, the non-filing plaintiff's attempt to piggyback onto the EEOC charge of Jack Haneline, a person who is not even a party in this action. (Comp., ¶ 29). Mr. Haneline's charge, which is not notarized or dated, cannot serve as a basis to satisfy the single filing rule. Not only is it untimely, as Haneline received a notice of right to sue in June of 1996 and never commenced a lawsuit, but the charge does not provide notice to the EEOC or FedEx of the type of class-wide allegations that are made in the Complaint. (Morrison Decl., Ex. 5).

Undoubtedly recognizing the flaw in the proposition that the Haneline charge can be used to satisfy the exhaustion requirements mandated by ADEA, plaintiffs grasp onto a lawsuit filed in Florida in 1999 - in which none of them was a party or a class member — as the jurisdictional predicate for this suit. (Comp., ¶ 30). In that matter, *Gerald Freeman, et. al v. Federal Express Corp. et. al*, Civil Action No. 99-2466-CIV-T-25B, six plaintiffs (hereinafter "the *Freeman* plaintiffs") sued FedEx in the U.S. District Court in Tampa, Florida, alleging age discrimination. (Morrison Decl., Ex. 9). None of the six *Freeman* plaintiffs is a named plaintiff in this action. No class was ever certified in the *Freeman* litigation, and the ease was dismissed without prejudice by the District Court on September 25, 2000. (Morrison Decl., ¶¶ 11-12, Ex. 9). The *Freeman* plaintiffs were granted leave to re-file the Complaint, which they failed to do.[3] (Morrison Decl.,

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[3] Rather than re-file within the time limit granted by the District Court, the *Freeman* plaintiffs elected to appeal the dismissal to the Eleventh Circuit Court of Appeals, which ultimately upheld the District Court's dismissal. *See Freeman v. Federal Express Corp.*,

¶ 11, Ex. 9.) Plaintiffs in this case ("the *Holowecki* plaintiffs") claim that many of them "attempted to join" the *Freeman* litigation in March 2001, six months after it had already been dismissed. (Comp., ¶ 30). Actually, the *Holowecki* plaintiffs' "attempt to join" the *Freeman* litigation was nothing more than an attempt by seven of the *Holowecki* plaintiffs to list themselves as parties in a proposed amended Complaint that the *Freeman* plaintiffs sought to file with the District Court on March 6, 2001. (Morrison Decl, ¶ 13, Ex. 10.) No order was ever issued granting the Freeman plaintiffs leave to amend, or allowing the *Holowecki* plaintiffs to join the *Freeman* litigation. (Morrison Decl, ¶¶ 13-14, Ex. 11.) None of the *Holowecki* plaintiffs were ever certified as members of the *Freeman* litigation.

In short, the *Holowecki* plaintiffs are arguing that unilaterally listing themselves in the caption of an unauthorized amended Complaint filed in another state by different plaintiffs in an unrelated action, that had been dismissed six months prior to their so listing themselves, satisfies their obligation to exhaust administrative remedies in this action. This is nonsense.

A similar assertion to that made by the *Holowecki* plaintiffs was flatly rejected three months ago in *Bliss v. Rochester City School Dist.*, 195 F. Supp. 2d 314 (W.D.N.Y. 2002). In *Bliss*, the plaintiff argued that she was not required

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2002 WL 187185 (11th Cir. 2002). While the District Court continued to receive various motions from the *Freeman* plaintiffs after dismissal and occasionally acted on the same, it acknowledged in its order closing the case that it was mistaken, and that all actions in the District Court after October 23, 2000, were a nullity. *See* Court's Order dated March 28, 2002, attached Morrison Decl. at Ex. 11.

to file a charge of discrimination because she could piggyback on the charges that had been filed in a different case - *Seils v. RCSD*, 199 F.R.D. 506 (W.D.N.Y. 2001).[4] In language that would be equally applicable here, the *Bliss* court rejected Plaintiff's argument:

> [P]laintiff also argues that she was not required to file any charge at all because she considers herself to be a member of a class action in the Seils case, and she attempts to "piggyback" on the charges filed in that case. Of course, this argument fails because no class was ever certified in the Seils case. Even if one had been certified, she would not [have] been able to elude the charge-filing requirements because she was not similarly situated to either of the plaintiffs in the now-dismissed Seils action.

Bliss, 196 F. Supp. 2d at 323. The arguments in favor of dismissal of the instant litigation are even stronger than those contained in *Bliss*. In this case, not only was no class ever certified in the *Freeman* litigation, the *Freeman* litigation was in fact dead in the District Court by the time the seven *Holowecki* plaintiffs even sought to join it (to the extent they can even be said to have "sought to join" the *Freeman* litigation). When adding the fact that the couriers in *Holowecki* are even less similarly situated than were the plaintiffs in *Seils* and *Bliss*, dismissal of this action is clearly warranted.

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[4] Notably, the *Seils* litigation has been filed in the same court as the *Bliss* litigation, unlike the instant case, in which plaintiffs reached over a thousand miles to a Court in Tampa, Florida, in an effort to avoid the charge filing requirement.

More importantly, had the *Freeman* litigation even been in existence at the time the seven *Holowecki* plaintiffs sought to join it, the *Holowecki* plaintiffs would have been precluded from opting in. None of the EEOC charges filed by the five of the original six *Freeman* litigants makes any claim of class-wide discrimination; rather, all of the charges assert individual discrimination, (Morrison Decl., Ex. 8). The Eleventh Circuit, the Circuit in which the *Freeman* litigation was brought, has adopted a firm rule that "[t]o serve as the basis of an ADEA class action, the underlying EEOC charge must contain allegation(s) of class-wide discrimination." *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1107 (11th Cir. 1996). Accordingly, none of the charges filed by any of the *Freeman* litigants could serve as the basis for any other non-charge filing plaintiff to opt into that action. Any plaintiffs who sought to do so, including the *Holowecki* plaintiffs, would have been denied in their efforts. *Tolliver, supra.*

3. Plaintiffs' State Law Claims

In Count II of their Complaint, plaintiffs highlight the fact that they are dissimilarly situated by seeking to bring class action claims under the state anti-discrimination laws in most of the various states in which they reside - New York, California, Florida, Illinois, Michigan and New Jersey. Because plaintiffs' federal age discrimination Complaint should be dismissed as set forth herein, the Court should decline subject matter jurisdiction over the pendant state claims.[5]

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[5] It should be noted that the state law claims of the two named plaintiffs who are citizens of New York (Holowecki and McQuillan) are time-barred. The statute of limitations for claims brought under the New York Human Rights Law is three years, and

CONCLUSION

Plaintiffs have failed to comply with the established jurisdictional prerequisites to suit under the ADEA. Instead they ask this Court to allow them to rely on old charges of discrimination filed by others with no connection to them and that could not now provide a foundation for suit, even for the original parties who filed them. Such an assertion completely eviscerates the charge-filing requirement mandated by the ADEA, and the important policies of conciliation and voluntary resolution that underlie them. For these reasons, the complaint under the ADEA should be dismissed in its entirety with prejudice as to all parties. Additionally, defendant should be awarded its costs, attorneys' fees, expenses, and all other relief the Court deems proper in having to respond to this action.

Dated: New York, New York
July 16, 2002

Respectfully submitted,

By: /s/_____
Traycee Ellen Klein, Esq. (TK 2755)
Epstein Becker & Green, P.C.
250 Park Avenue
New York, New York 10177-0077
(212) 351-4500

Holowecki and McQuillan are challenging actions that were taken in 1994 and 1995. *See Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 307, 461 N.Y.S.2d 232, 239, 448 N.E.2d 86, 93 (1983).

Carl K. Morrison, Esq.
Senior Attorney - Litigation
Federal Express Corporation
3620 Hacks Cross Road
3rd Floor - Building B
Memphis, Tennessee 38125
(901) 434-8552

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02-CV-3355

[Filed July 18, 2002]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Thompics, individually and on behalf of others similarly situated, Plaintiffs,	)
vs.	)
Federal Express Corporation, Defendant.	)

DECLARATION OF CARL K. MORRISON

I, Carl K. Morrison, under penalty of perjury, declare as follows:

1. I am employed as a Senior Attorney by Federal Express Corporation, which conducts business as FedEx Express ("FedEx"), at its offices in Memphis, Tennessee. I am a member in good standing of the bar of the State of Tennessee, and I will be submitting an application to appear in this action *pro haec vice* as one of the attorneys for FedEx. I present this declaration as an officer of the Court. I am a custodian of records for FedEx, and I am authorized to

provide this Declaration on its behalf. The facts stated herein are true and correct.

2. I submit this Declaration in support of FedEx's Motion to Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), on the grounds that plaintiffs have not exhausted the administrative remedies necessary to commence a lawsuit under the Age Discrimination Employment Act and may not piggyback onto untimely actions. A copy of the Complaint is attached hereto. I reviewed the employment records maintained by FedEx for each of the fourteen named plaintiffs in this action to determine whether each was ever employed by FedEx, and if so, the geographic location where employed (or where employed at time of termination, if applicable), the position held (or held at the time of termination, if applicable), the date of termination (if applicable), the date of any charges of age discrimination filed with the Equal Employment Opportunity Commission ("EEOC") or any other agency responsible for enforcement of state or local employment discrimination laws, and the date of issuance of any Notice of Right to Sue by the EEOC with respect to those charges.

3. Based on my review of FedEx's records, FedEx does not have any record of having employed plaintiff Nancy Thompics. The chart attached hereto as Exhibit 1 accurately states the information found in the records maintained in the ordinary course of FedEx's business for the remaining fourteen plaintiffs.

4. Attached hereto as Exhibit 2 are letters or other documents confirming the termination of employment for those plaintiffs who are no longer employed by FedEx.

5. Attached as Exhibit 3 are true and correct copies of the charge of discrimination filed by plaintiff Kevin McQuillan and the subsequent right to sue notice issued by the EEOC with respect to this charge that is dated June 11, 1999. This is the only charge of age discrimination filed by McQuillan against FedEx.

6. Attached as Exhibit 4 are true and correct copies of the charge of discrimination filed by George Robertson and the subsequent right to sue notice issued by the EEOC with respect to this charge that is dated April 25, 2001. This is the only charge of age discrimination filed by Robertson against FedEx.

7. Federal Express has no record of any charges of age discrimination being filed with either the EEOC, or any other agency responsible for enforcement of state or local employment discrimination laws, by any other individual named as a plaintiff in this lawsuit.

8. Attached as Exhibit 5 are true and correct copies of the charge of discrimination filed by Jack Haneline and the subsequent right to sue notice issued by the EEOC with respect to this charge dated June 24, 1996. This is the only charge of discrimination filed by Mr. Haneline against FedEx.

9. On October 26, 1999, a lawsuit for age discrimination entitled *Gerald Freeman, et. al v. Federal Express Corp., et. al* was filed in the United States District Court for the Middle District of Florida in Tampa. Attached as Exhibit 6 is a true and correct copy of the cover page of the complaint in *Freeman*. Attached as Exhibit 7 is a true and correct copy of the Civil Docket for the *Freeman* litigation, as available on U.S. District Court Web Pacer on June 8, 2002.

10. Attached as Exhibit 8 are true and correct copies of the charges of age discrimination filed against FedEx by those plaintiffs in the *Freeman* litigation who elected to file charges, and the right to sue notices issued by the EEOC and received by FedEx for each such charge.

11. The *Freeman* litigation was dismissed by the District Court on September 25, 2000 without prejudice to re-filing it by October 23, 2000. Attached as Exhibit 9 is a true and correct copy of that Order, which was affirmed by the Eleventh Circuit Court of Appeals. *Freeman v. Federal Express Corp.*, 2002 WL 187185 (11th Cir. 2002).

12. As shown by the Civil Docket attached hereto as Exhibit 7, the Court in *Freeman* never entered any order certifying that the action could proceed on behalf of any class of FedEx employees.

13. Without leave of Court being granted, on March 6, 2001, the plaintiffs in the *Freeman* litigation attempted to file a Second Amended Complaint that proposed adding several additional plaintiffs, including some of the individuals who are plaintiffs in this action. A true and correct copy of the first page of the Second Amended Complaint in *Freeman* is attached as Exhibit 10. The District Court in *Freeman* never entered any order allowing the Amended Complaint.

14. On March 28, 2002, the District Court in *Freeman* entered an Order directing administrative closure of the case, on the grounds that its Order of September 25, 2000 dismissing the original complaint with leave to re-file it by October 23, 2000 became final on October 23, 2000, that the complaint was not re-filed by that deadline, and all proceedings thereafter in the District Court were a nullity.

Attached as Exhibit 11 is a true and correct copy of that Order. No appeal was taken of that Order.

15. I declare under penalty of perjury, under the laws of the States of Tennessee and New York, that the foregoing is true and correct. If called upon to testify, I could and would competently testify to the matters as set forth above.

Executed this 16th day of July, 2002.

/s/
Carl K. Morrison

HOLOWECKI, ET AL V. FEDERAL EXPRESS CORPORATION
U.S.D.C., SOUTHERN DISTRICT OF NEW YORK 02-cv-3355

	LAST NAME	FIRST NAME	LOCATION	TERM DATE	REASON FOR TERMINATION	DATE(S) OF CHARGE(S)	DATE(S) OF NRTS
1	Holowecki	Paul	Garden City, NY	2/8/2000	Violation of Acceptable Conduct policy	None	N/A
2	Kennedy	Patricia	Dunedin, FL	Active	N/A	None	N/A
3	Lewis	Donna	Mount Shasta, CA	9/24/2001	Violation of Medical Leave policy	None	N/A
4	Moncalieri	Charles	Lakewood, NJ	6/23/2000	Voluntary resignation	None	N/A
5	Nelson	Phyllis	Urbana, IL	1/11/2000	Voluntary resignation	None	N/A
6	Kubicki	Andy	Fullerton, CA	Active	N/A	None	N/A
7	Tucker	Elizabeth	Indianapolis, IN	Active	N/A	None	N/A
8	Almendarez	Steven	Pittsburgh, PA	4/30/2002	Violation of Acceptable Conduct policy	None	N/A
9	Martinez	Frank	Fullerton, CA	Active	N/A	None	N/A

	LAST NAME	FIRST NAME	LOCATION	TERM DATE	REASON FOR TERMINATION	DATE(S) OF CHARGE(S)	DATE(S) OF NRTS
10	Martinez	Kelly	Fullerton, CA	4/6/2001	Fail to return from Medical Leave	None	N/A
11	McQuillan	Kevin	Hicksville, NY	3/30/1998	Violation of Performance Improvement policy	9/11/1998	6/11/1999
12	Mutchler	Kenneth	Pittsburgh, PA	Active	N/A	None	N/A
13	Robertson	George	Waukegan, IL	9/7/2000	Fail to return for TRW (Temporary Return to	12/1/2000	4/25/2001
					Work assignment)		
14	Tompics*	Nancy					
	*UNKNOWN						

FedEx
Federal Express

PRISM AUTHORIZATION FORM
Correct information in this area
will GREATLY speed processing.

Complete the "bubble" sections, neatly darkening in the circles.

Employee Number (Right Justified)	First Letter of Last Name	Second Letter of Last name	Transaction Effective Date		
			Month	Day	Year
024195	H	O	02	08	00

* * *

VERIFIED
FEB. 21 2000
FL

JA 66

EMPLOYEE NO.	SOCIAL SECURITY NO.	LAST NAME	MI	FIRST NAME
24195	[REDACTED]	HOLOWECKI		PAUL

TERMINATION DATA

TRAN CODE	REHIRE	LAST DAY WORKED
371	N	02/08/00

VACATION PAY	IF YES	CURRENT NO. HRS	ACCRUED NO. HRS	EQUIP OR ADV OUTSTANDING
Y		96		

* * *

COMMENTS: Employee terminated for Acceptable Conduct Violation

/s/ 57322 2-8-00 /s/ _____ 2/9/00
Manager

/s/ 36473 2/8/00
SR MGR

PAF 9506 01

FedEx
Federal Express

INTER-OFFICE MEMORANDUM
Date: February 8, 2000
From: Nicholas Roros
Subject: *Termination Letter Acceptable Conduct*
To: Paul Holowecki
Employee # 24195
cc: Tom Hand
Nannette Malebranche
Glenn Jennings
PICC
File

Based on a thorough investigation, it has been determined that your conduct clearly violates the Acceptable Conduct Policy (2-5). Therefore, you are hereby terminated from Federal Express, effective February 8, 2000.

Should you in good faith believe this action to be unfair you have the right to proceed to Step 2 of the Guaranteed Fair Treatment Process by submitting the attached bubble form within five (5) calendar days of receipt of this notice. THE FORM MUST BE RECEIVED AT THE ADDRESS INDICATED BELOW ON OR BEFORE day five (5). Send the original document, including the bubble page and any additional documents in a large envelope (form should not be folded) to:

Federal Express Corporation
PICC/GFTP
3975 Airways
2nd Floor, Module E
Memphis, TN 38116

The information from these documents will be scanned into the GFTPP System and electronic notifications will be sent to Thomas Lynch, Regional Vice President, Kenneth A. May, Senior Vice President and Personnel. Please feel free to discuss this with your Personnel Representative, Glenn Jennings, who can be reached at 516-777-7925.

The internal mail system (COMAT) was offered to forward my GFTP complaint. I have ___ accepted/___ declined this offer. I have also been advised that PICC should only receive the bubble sheet and successive levels of management during the GFTP will receive the supporting documentation. Additionally, I solely responsible for the five (5) day receipt of this information.

Regards,

/s/_____
Nicholas Roros
Operations Manager
BPA/NY/11530

I have read and understand the above.

_____	_____	_____
Signature	Employee #	Date

Attachments: Acceptable Conduct Policy, GFTP Policy, GFTP Instruction form

Witnessed – refused to sign
/s/ 2/8/00

FedEx
Express

September 24, 2001

Donna Lewis
14712 Old Westside Road
Grenada, CA 96038

RE: TERMINATION

As you were advised in a June 27, 2001 correspondence referencing the guidelines of the Medical Leave of Absence Policy (P1-7), you had reached a permanent and stationary status and were permanently incapable of performaing the essential functions of your position as a Courier / NON DOT. You were informed that you would have ninety (90) calendar days to find a position for which you met the minimum specifications and could perform the essential functions. It was also noted in that same correspondence that if you were not successful in finding a job within that specified period of time that your employment with FedEx Express would be terminated.

On September 18, 2001 you were offered a part-time Truck Control Agent position at the RTD Facility in San Leandro, CA, but you declined that offer. Since you have not secured a position within your medical restrictions within the ninety (90) day period, your employment with FedEx Express will be terminated effective September 24, 2001. You should be receiving information regarding continuation of Health Coverage through COBRA and information on your current savings plans within a few weeks.

Donna, I wish you good luck in your future endeavors.

Should you in good faith believe this action to be unfair, you have the right to proceed to Step 1 of the Guaranteed Fair Treatment Process by submitting the attached bubble form within five (5) calendar days of receipt of this notice. The form must be received at the addres indicated below on or before day five (5). Send the original document, including the bubble page and any additional documents in a large envelope (form should not be folded).

TO: Federal Express Corporation
PICC/GFTP
3975 Airways, 2nd Floor, Module E
Memphis, TN 38116

The information on these documents will be scanned into the GFTP system and electronic notifications will be sent to the appropriate levels of management and your personnel representative. You will be notified regarding the meeting or conference call addressing your concerns. Please feel free to discuss this with your Sr. Personnel Representative, Roberta Garner, who can be reached at 503-670-4543.

Please sign this original letter as indicated below and return it to me in the enclosed self-addressed stamped envelope along with your company ID badge. I have enclosed a copy of this letter for your personal files. Signing this document does not indicate that you agree with its content, it merely indicates that you have received a copy of this document.

Sincerely,

/s/
Harry Suarer
Manager HCMP/Ops
Golden State District
Phone: 800-228-4631

_____ _____
Employe Signature Date

Attachments: FedEx Policies: P1-7, 5-5, GFTP Form
cc Roberta Garner, Sedgwick, Intracorp, Kemper

FedEx
Federal Express

PRISM AUTHORIZATION FORM
Correct information in this area
will GREATLY speed processing.

Complete the "bubble" sections, neatly darkening in the circles.

Employee Number (Right Justified)	First Letter of Last Name	Second Letter of Last name	Transaction Effective Date		
			Month	Day	Year
016908	M	O	06	23	00

* * *

VERIFIED BY DRW 06/24/2000

EMPLOYEE NO.	SOCIAL SECURITY NO.	LAST NAME	MI	FIRST NAME
16908	[REDACTED]	MONCALIERI	A.	CHARLES

TERMINATION DATA

TRAN CODE	REHIRE	LAST DAY WORKED
304	Y	6/23/00

ELIGIBLE VACATION PAY	IF YES	CURRENT NO. HRS	ACCRUED NO. HRS	EQUIP OR ADV OUTSTANDING
yes		100		

* * *

COMMENTS: EmpLoyEE ResigNed AS OF 6/23/00, SEE AttAched letter

/s/ 154015 6/19/00
MGR
/s/ 58206 6/19/00

PAF 9506 01

Charles Moncalieri
124 Brigantine Road
Manahawkin, New Jersey 08050
June 13, 2000

Federal Express
1000 Bennett Road
Lakewood, New Jersey

Re: Employee # 16908

To Whom It May Concern:

I have been a loyal, dedicated full-time employee with Fed Ex for 19 ½ years. Through these years, I have worked at the following stations: TEB-A, GMV-A, PIE-A, CLW-A, and MJX-A in which I had enjoyed very much.

Because my wife and I had made the decision to move from Florida (CLW-A) to our home state of New Jersey, I had to transfer back part-time because their were no available full-time routes available at that time. Since that time of March, 1999, I have been awaiting a full-time position and have been informed by management that there will be no full-time routes available in the Lakewood NJX-A station in the future. I was also informed that I cannot transfer out of the station to another full-time status since there is currently a letter in my file.

Being it has been such a hardship supporting a family of four working part-time (4-5 hrs per day), I have been left no alternative but to retire as of 6/23/00.

Although I was told I am not eligible for any retirement benefits until the age of 55, I will at that time file for all benefits due me at 5/8/07.

Thank you for the opportunity of working for Fed Ex all these years. This was a company I truly enjoyed working for.

Sincerely

/s/
Charles Moncalieri

[Notary signature]
[Notary name]
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires July 12, 2001

FedEx
Federal Express

PRISM AUTHORIZATION FORM
Correct information in this area
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Complete the "bubble" sections, neatly darkening in the circles.

Employee Number (Right Justified)	First Letter of Last Name	Second Letter of Last name	Transaction Effective Date		
			Month	Day	Year
159375	N	E	01	11	00

* * *

Approved by S.Brown 01/19/2000
Verified by J Madison 01/19/2000

JA 77

EMPLOYEE NO.	SOCIAL SECURITY NO.	LAST NAME	MI	FIRST NAME
159375	[REDACTED]	Nelson	G.	Phyllis

TERMINATION DATA

TRAN CODE	REHIRE	LAST DAY WORKED
304	Y	01/11/00

ELIGIBLE VACATION PAY	IF YES	CURRENT NO. HRS	ACCRUED NO. HRS	EQUIP OR ADV OUTSTANDING
Y		0	42	N

BUDGET CHARGE LOC.

CO	DIV	DEPT	LOC	LABOR ACCT. CODE
01	70	256	618	0520100

JOB CODE	REASON	STAFFING	POSITION NO.
R0002	0	0	188152

ORGANIZATION CODE	REASON	COMAIL ADDRESS
10134000603	E	61801-0000

REASON	BASE SALARY	PERIOD FREQ.	CHANGE AMOUNT
0	17.16	HRW	.00

COMMENTS: Voluntary resignation effective 1/11/00. 42 hours vacation due

/s/ 41960 1-11-00
MGR

* * *

PAF 9506 01

December 30, 1999
Mr. Paul Davison
FedEx
2007 Federal Way
Urbana, IL 61801

Dear Mr. Davison:

I am writing to confirm our conversation today. As we discussed, my two week noticed began on December 24, 1999 and my last day at the Champaign station will be January 7, 2000. As you know, I will be leaving the station because my husband will be taking a new position in Missoula, Montana so that we can be closer to our parents who will need more of our help in the future years.

I have appreciated all the support that you and FedEx have given me in the past, so I could visit our family during previous years.

Sincerely,

Phyllis G. Nelson
159375

FedEx
Federal Express

PRISM AUTHORIZATION FORM

Correct information in this area
will GREATLY speed processing.

Complete the "bubble" sections, neatly darkening in the circles.

Employee Number (Right Justified)	First Letter of Last Name	Second Letter of Last name	Transaction Effective Date		
			Month	Day	Year
005302	A	L	04	30	02

* * *

Verified by K Horton 5/23/2002 4:46:00 PM

JA81

EMPLOYEE NO.	SOCIAL SECURITY NO.	LAST NAME	MI	FIRST NAME
5302	[REDACTED]	Almendarez		Stephen

TERMINATION DATA

TRAN CODE	REHIRE	LAST DAY WORKED
371	N	4/24/02

ELIGIBLE VACATION PAY	IF YES	CURRENT NO. HRS	ACCRUED NO. HRS	EQUIP OR ADV OUTSTANDING
Y		8	200	

BUDGET CHARGE LOC.

CO	DIV	DEPT	LOC	LABOR ACCT. CODE
01	70	256	152	0520100

JOB CODE	REASON	STAFFING	POSITION NO.
R0088			010638

ORGANIZATION CODE	REASON	COMAIL ADDRESS
1013810207		15205-0000

* * *

COMMENTS: Steve was terminated effective 4-30-02 for violation of the Acceptable Conduct Policy (P2-5) as it related to falsification.

/s/ 141128 5-14-02
MGR

/s/ 315963 5-4-02
HR REP

/s/ 165612 5-14-02
SR MGR

PAF 9506 01

FexEx
Express

Date: April 29, 2002
From: Ty Betters

To: Steve Almendarez
CC: Terri Galloway
Kim Whigham
Denise Cooper
HRIS
File

RE: Termination

After completion of a through investigation into your alleged violation (s) of the Acceptable Conduct Policy 2-5, the decision has been made to terminate your employment with FedEx effective April 30, 2002. My decision to issue you this discipline took into consideration your statement and those of witnesses, your tenure with the Company, past performance, and disciplinary history.

It is unfortunate that this action is necessary and I wish you success in future career endeavors.

Should you in good faith believe this action is unfair, you have the right to enter the Guaranteed Fair Treatment Procedure/EEO Complaint Process by submitting the attached bubble form within five (5) calendar days of receipt of this letter. This form must be received at the address indicated below on or before day five (5). Send the original document including the bubble page, and any additional documents in a large envelope (form should not be folded). Send to:

Federal Express Corporation
HRIS/GFTP
3975 Airways Blvd., 2nd Floor, Module E
Memphis, TN 38116

The information on these documents will be scanned into the GFTP system and electronic notifications sent to appropriate levels of management and your Human Resources Representative. You will be notified regarding the meeting addressing your concerns. Please feel free to discuss this with Denise Cooper your Human Resources Representative. Denise can be reached at 412-299-3416.

My signature indicates that I have received a copy of this letter and understand its contents.

/s/ _____	4-30-02 _____
Employee	Date
/s/ _____	4-30-02 _____
Manager	Date
_____	_____
Witness	Date

Enclosed: Acceptable Conduct Policy 2-5
Guaranteed Fair Treatment Procedure/EEO Compliant Process 5-5

FedEx
Express

January 25, 2002

Kelly Martinez
3009 E. Via Palermo
Anaheim, CA 92806

Dear Kelly

On April 23, 2001, you were placed on medical leave of absence. On October 9, 2002, I advised you that your leave would expire on January 9, 2002 and that you could apply for positions for which you qualified and could perform the essential functions, with or without reasonable accommodation.

Based on the most recent medical information you have provided me you are unable to return to your job as a Courier/DOT at FUL and have not secured another position within the Company. Therefore, in accordance with the Leave of Absence (Medical) Policy (P1-8) it is necessary to terminate your employment since you have been unable to return from your leave of absence.

In accordance with the Termination Policy, P4-90, if you have the following items in your possession, they must be returned to the Company. I have enclosed a pre-paid self-addressed ONL envelope for your convenience.

- Employee ID
- Keys
- Entry car, if applicable
- Payment for outstanding travel advances

- Repayment of bad checks written to the Company
- Credit association loans
- Credit cards for the following
  - Gasoline
  - Air travel
  - American Express
  - Telephone
  - Car rental
- Equipment issued in employee's name (e.g., uniform, rain gear)
- Company manuals, other Company property, etc.

You will be receiving additional information from the Company about any eligibility you may have for the continuation of your Group Health Benefits.

Should you in good faith believe this action to be unfair you have the right to proceed to Step 1 of the Guaranteed Fair Treatment Process, by submitting the attached bubble form within five (5) days of receipt of this notice. THE FORM MUST BE RECEIVED AT THE ADDRESS INDICATED BELOW ON OR BEFORE DAY FIVE (5). Send the original documents in the enclosed ONL envelope (form should not be folded) to:

Federal Express Corporation
PICC/GFTP
3975 Airways, 2nd Floor, Module E
Memphis, TN 38116

The information from these documents will be scanned into the GFTP System and electronic notifications will be sent to appropriate levels of management and your personnel representative. You will be notified regarding the meeting or conference call addressing your concern. Please feel free to

discuss this with your Personnel Representative, Barbara DiFrancia who can be reached at (949) 862-4506.

Sincerely,

/s/
Paul Coleman
HCMP Manager
Southern California District

cc: Barbara DeFrancia

Attachments: Policies P1-8, P5-5, P4-90
ONL envelopes with airbills

FedEx
Federal Express

PRISM AUTHORIZATION FORM

Correct information in this area
will GREATLY speed processing.

Complete the "bubble" sections, neatly darkening in the circles.

Employee Number (Right Justified)	First Letter of Last Name	Second Letter of Last name	Transaction Effective Date		
			Month	Day	Year
032792	M	C	03	30	98

* * *

EMPLOYEE NO.	SOCIAL SECURITY NO.	LAST NAME	MI	FIRST NAME
32792	[REDACTED]	McQuillan		Kevin

TERMINATION DATA

TRAN CODE	REHIRE	LAST DAY WORKED
373	N	3/27/98

ELIGIBLE VACATION PAY	IF YES	CURRENT NO. HRS	ACCRUED NO. HRS	EQUIP OR ADV OUTSTANDING
Y		8	128	N

BUDGET CHARGE LOC.

CO	DIV	DEPT	LOC	LABOR ACCT. CODE
01	40	256	425	0520100

JOB CODE	REASON	STAFFING	POSITION NO.
R0002	0	0	053356

ORGANIZATION CODE	REASON	COMAIL ADDRESS
10133A0403	0	11801-0000

* * *

COMMENTS: Termination due to performance improvement 3 letters in 3 months.

/s/	39736	SM	3/30/98	/s/	213261	3/30/98
/s/	22370	Mgr	3/30/98	/s/	77435	4/2/98

Fed
Federal Express

VERIFIED Apr. 10 1998 S. WARD
32792

Date: March 30, 1998 To: Kevin McQuillan

From: Frank Cantreva 2237C c: B. Rogers
N. Malebranche
G. Jennings
PICC
File

Subject: **Warning Letter/**
Termination
Violation Policy #2-5
Acceptable Conduct

This warning Letter is being issued to you as a result of the Customer Complaint and follow-up letter dated 3/24/98 and 3/26/98 respectively.

On March 24, 1998 Autoliners, a long time Customer of Federal express called to complain about your behavior towards the females at this location. His complaint was "Kevin behaves inappropriately to female employees by making sexual innuendoes." We also have a letter dated Marched 26, 1998, from an employee of Autoliners, outlining your alleged remarks more specifically as disrespectful and inappropriate. This is in direct violation of Policy 5-55 (attached) Sexual Harassment. This type of behavior is not accepted at Federal Express.

Kevin, with this warning Letter, you have three (3) current letters on file, which according to Policy 2-50 Performance Improvement your employment with Federal Express as of 3/30/98 is terminated.

Should you in Good faith believe this action to be unfair, you have the right to proceed to Step 1 of the Guaranteed Fair Treatment Process. Attached is the GFT Instructions for terminated employees. You must submit your original document, including the Bubble Page and any additional documents within five (5) calendar days. You must submit your packet to the address indicated in this packet. You will be notified regarding the meeting on Conference Call addressing your concerns. Please feel free to discuss this with your Senior Personnel Representative, Glenn Jennings, who can be reached at (516) 777-7900.

Respectfully,

/s/
Frank Cantreva
Operations Manager
DPKA/NY/11801
KMcQ term

I have read and understand the above and received copies of applicable Policies.

Signature	Empl.#	Date

Witnessed by Bill Rogers 3/30/98

FedEx
Federal Express

September 7, 2000

George Robertson
36869 N. Bernice Drive
Lake Villa, IL 60046

Dear George:

On June 19, 2000, you were sent a letter stating that you were to report for TRW on June 20, 2000 in which you failed to report. On August 8, 2000, you were sent another letter stating that you needed to report for TRW on August 14, 2000. You responded to that letter stating that you wanted to request your personal days, floating holidays and vacation time but failed to report for TRW. On August 25, 2000, you were sent a third letter requesting you to report for TRW on August 30, 2000, in which you again failed to report, also in that letter I stated that you needed to report back to work and submit your request in writing. As I stated in my letters, failure to comply with the conditions of your medical leave means that you are on an unauthorized leave of absence and subject to termination. After consulting with Personnel and Legal and under the guidelines of P1-68, I have no choice but to terminate your employment effective September 7, 2000 for violation of P1-68 for failure to return for TRW.

Should you in good faith believe this action to be unfair you have the right to proceed to Step 1 of the Guaranteed Fair Treatment Process, by submitting the attached bubble form within five (5) days of receipt of this notice. THE FORM MUST BE RECEIVED AT THE ADDRESS INDICATED

BELOW ON OR BEFORE DAY FIVE (5). Send the original documents in a large envelope (form should not be folded) to:

Federal Express Corporation
PICC/GFTP
3975 Airways, 2nd Floor, Module E
Memphis, TN 38116

The information from these documents will be scanned into the GFTP System and electronic notifications will be sent to appropriate levels of management and your personnel representative. You will be notified regarding the meeting or conference call addressing your concern. Please feel free to discuss this with your Personnel Representative, Sharron Smith, who can be reached at 312-651-2363.

Sincerely,

/s/
Brenda Gilliam
HCMP Manager
Lake Shore District
312-651-2362

cc: Sharron Smith
Kemper National Services

Attachments: P1-6, P5-5, P1-68

EEOC FORM 5

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY ☐ FEPA
☒EEOC

CHARGE NUMBER 160982761

_____ and EEOC
State or local Agency, if any

NAME *(Indicate Mr., Ms., Mrs.)*
Mr. Kevin Mcquillan

HOME TELEPHONE *(Include Area Code)*
(516) 264-0904

STREET ADDRESS CITY, STATE AND ZIP CODE
132 Merrick Road, #5, Amityville, NY 11701

DATE OF BIRTH
[REDACTED]/55

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME
Federal Express

NUMBER OF EMPLOYEES, MEMBERS
Cat D (501 +)

TELEPHONE *(Include Area Code)*
(516) 933-1732

STREET ADDRESS CITY, STATE AND ZIP CODE
201 West John Street, Hicksville, NY 11801

COUNTY
059

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

* * *

☒ AGE

DATE DISCRIMINATION TOOK PLACE

EARLIEST	*LATEST*
03/31/98	03/31/98

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I began employment with the above named Respondent on February 8, 1984. I was last employed as a Courier. On March 31, 1998, my employment was subsequently terminated.

The reason given for my termination by my immediate supervisor was unsatisfactory performance. My employer initiated a program which was supposed to be an incentive bonus plan but became a minimum standard for job security.

In this program, the employer set performance goals which were supposed to be mutually agreed upon but were not, ostensibly to reward employees who hit or exceeded set goals. Initially this was so but eventually became minimum standards which were not agreed to and which were enforced more stringently on senior employees. I had always performed my job duties in a satisfactory manner.

I believe I was discriminated against because of my age (43) in violation of the Age Discrimination in Employment Act of 1967, as amende

* * *

I declare under penalty of perjury that the foregoing is true and correct.

9/11/98 /s/
Date Charging Party *(Signature)*

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

/s/
SUBSCRIBED AND SWORN BEFORE ME THIS DATE
(Day, month, and year)

9-11-98 /s/
[Notary seal]

EEOC Form 161

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: Mr. Kevin Mcquillan
132 Merrick Road, Apt. #5
Amityville, NY 11701

From: Equal Employment Opportunity Commission
New York District Office
7 World Trade Center, 18th Floor
New York, New York 10048

* * *

Charge No.	EEOC Representative	Telephone No.
160-982761	Legal Unit	(212) 748-8500

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

* * *

[X] The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

* * *

- NOTICE OF SUIT RIGHTS -
(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed WITHIN 90 DAYS from your receipt of this Notice; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

On behalf of the Commission

/s/ JUN 11 1999
Spencer H. Lewis, Jr., District Director *(Date Mailed)*

Enclosure(s)

cc: Carolyn Robertson
Federal Express
Sr. EEO Specialist, Employee Relations Dept.
Delivery Code: 2240
2600 Nonconnah, Suite 100
Memphis, TN 38132

EEOC FORM 5

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY ☐ FEPA
☒EEOC

CHARGE NUMBER 210A11349

Illinois Dept. of Human Rights and EEOC
State or local Agency, if any

NAME *(Indicate Mr., Ms., Mrs.)*
Mr. George Robertson

HOME TELEPHONE *(Include Area Code)*
(847) 265-6017

STREET ADDRESS CITY, STATE AND ZIP CODE
36869 N. Bernice Drive, Lake Villa, IL 60046

DATE OF BIRTH
[Redacted]/1960

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME
Federal Express

NUMBER OF EMPLOYEES, MEMBERS
Cat D (501 +)

TELEPHONE *(Include Area Code)*
(901) 922-5215

STREET ADDRESS CITY, STATE AND ZIP CODE
2600 Nonconnah, Suite 100, Memphis, TN 38132

COUNTY
157

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

* * *

☒ AGE
☒ DISABILITY

DATE DISCRIMINATION TOOK PLACE
EARLIEST *LATEST*
09/07/2000
☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I was employed at Respondent since approximately 1984. As a result of a work place injury I became a person with a disability. My performance has always been excellent. In August 2000, Respondent refused to allow me to take my accrued leave. I was denied additional benefits to which I was entitled. On September 8, 2000 I was terminated.

I believe I have been discriminated against because of my age, 40 (date of birth [REDACTED]1960), in violation of the Age Discrimination in Employment Act of 1967, as amended, and because of my disability, in violation of the Americans with Disabilities Act of 1990.

* * *

I declare under penalty of perjury that the foregoing is true and correct.

12/1/2000 /s/
Date Charging Party *(Signature)*

* * *

EEOC Form 161

Equal Employment Opportunity Commission

DISMISSAL AND NOTICE OF RIGHTS

To: George Robertson
2521 Country Hill Court
Lake Carol, IL 61046

7099 3400 0006 7301 6056

From: Equal Employment Opportunity Com0435ion
500 West Madison Street
Suite 2800
Chicago, Illinois 60661-2511

* * *

Charge No.	EEOC Representative	Telephone No.
210A11349	Maura Caroselli, Investigator	(312) 886-4824

(See the additional information attached to this form.)

YOUR CHARGE IS DISMISSED FOR THE FOLLOWING REASON:

* * *

[X] You failed to provide requested information, failed or refused to appear or to be available for necessary interviews/conferences, or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more

than 30 days in which to respond to our final written request.

* * *

- NOTICE OF SUIT RIGHTS -

[X] Title VII and/or the Americans with Disabilities Act: This is your NOTICE OF RIGHT TO SUE, which terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in a court of competent jurisdiction. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice; otherwise your right to sue is lost.

[X] Age discrimination in Employment Act: This is your NOTICE OF DISMISSAL OR TERMINATION, which terminates processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in a court of competent jurisdiction. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice; otherwise your right to sue is lost.

* * *

On behalf of the Commission

4-25-01 /s/
John P. Rowe, District Director

Enclosures
Information Sheet

Copy of Charge
cc: Respondents Federal Express

EEOC FORM 5

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY ☐ FEPA
☒EEOC

CHARGE NUMBER 151951501

_____ and EEOC
State or local Agency, if any

NAME *(Indicate Mr., Ms., Mrs.)*
Mr. Jack H. Haneline II

HOME TELEPHONE *(Include Area Code)*
(813) 855-4953

STREET ADDRESS CITY, STATE AND ZIP CODE
8518 Manassas Road, Tampa, FL 33635

DATE OF BIRTH
[Redacted]/49

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME
Federal Express

NUMBER OF EMPLOYEES, MEMBERS
Cat D (501 +)

TELEPHONE *(Include Area Code)*
(813) 736-6727

STREET ADDRESS CITY, STATE AND ZIP CODE
1881 Main Street, Dunedin, FL 34698

COUNTY
057

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

* * *

☒ RACE
☒ AGE

DATE DISCRIMINATION TOOK PLACE

EARLIEST	*LATEST*
11/11/94	11/18/94

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

PERSONAL HARM:

On November 11, 1994 I was suspended. On November 18, 1994 I was discharged.

RESPONDENT'S REASON FOR ADVERSE ACTION:

Mark Month, Manager, advised me that I was being suspended pending an on-going investigation. Mark Month told me that I was discharged for misconduct.

STATEMENT OF DISCRIMINATION:

Although there was not proof that I was guilty, I was given a more severe discipline than two younger Couriers and one Black Courier. I believe I was discriminated against because of my race, White, and my age, 44, in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act of 1967, as amended.

☒I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

/s/

Date Charging Party *(Signature)*

* * *

EEOC Form 161

Equal Employment Opportunity Commission

DISMISSAL AND NOTICE OF RIGHTS

To: Jack H. Haneline, II
8518 Manassas Road
Tampa, Florida 33635

From: U.S. Equal Employment Opportunity Commission
Tampa Area Office
501 East Polk Street, Suite 1020
Tampa, Florida 33602

* * *

Charge No.	EEOC Representative	Telephone No.
151951501	Jasper H. Crawford, Enforcement Unit 1, Investigator	(813) 228-2310

(See the additional information attached to this form.)

YOUR CHARGE IS DISMISSED FOR THE FOLLOWING REASON:

* * *

[X] The Commission issues the following determination: Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other

issues that might be construed as having been raised by this charge.

* * *

– NOTICE OF SUIT RIGHTS –

[X] Title VII and/or the Americans with Disabilities Act: This is your NOTICE OF RIGHT TO SUE, which terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in U.S. District Court. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice; otherwise your right to sue is lost.

[X] Age Discrimination in Employment Act: This is your NOTICE OF DISMISSAL OR TERMINATION, which terminated processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in U.S. District Court. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice; otherwise your right to sue is lost.

* * *

On behalf of the Commission

June 24, 1996 — /s/ signature illegible
(Date Mailed) — J. D. Packwood, Jr. Area Director

Encls (1)
Copy of Charge

cc:
Federal Express

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 99-2466-CIV-T-25B

[Received Oct. 26, 1999]

Gerald D. Freeman, Plaintiff, *Pro Se*)
)
Vincent Maccia; Plaintiff, *Pro Se*)
)
Ronald Clausnitzer, Plaintiff, *Pro Se*)
)
Wayne C. Tate, Plaintiff, *Pro Se*)
)
Kathy Creamer, Plaintiff, *Pro Se*)
)
William G. Krolman, Plaintiff, *Pro Se*, et al.)
)
vs.)
)
Federal Express Corporation, Mary Alice Taylor,)
Marco Chan, Scott Bunker, Susan Martin, Teri)
Galloway, Ardy Piazza, Lou Fusco, Susan Matlock,)
et al.)
Defendants)

Plaintiffs, Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy Creamer, William G. Krolman, and other similarly situated couriers sues the Defendants, Federal Express Corporation and others and alleges:

INTRODUCTION

1. This is a proceeding for injunctive relief and damages to redress the deprivation of rights secured to the Plaintiffs and others by section 7(b), 29 U.S.C. § 626(b) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 et seq. ("ADEA"),

* * *

U.S. District Court
Middle District of Florida (Tampa)
CIVIL DOCKET FOR CASE #: 99-CV-2466

Freeman, et al v. Federal Express Corp, et al

Filed: 10/26/99
Assigned to: Judge James S. Moody, Jr.
Jury demand: Plaintiff
Demand: $0,000
Nature of Suit: 442
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in other court: None
Cause: 42:2000 Job Discrimination (Age)

DOCKET PROCEEDINGS

Date	#	Docket Entry
10/26/99	1	CLASS ACTION COMPLAINT and demand for jury trial filed (jlg) [Entry date 10/27/99] [Edit date 10/27/99]
10/26/99	--	FILING FEE PAID. (Filing Fee $ 150.00 Receipt # T001398) (jlg) [Entry date 10/27/99]
10/26/99	--	MAGISTRATE JUDGE CASE ASSIGNMENT Magistrate assigned: Thomas G. Wilson (jlg) [Entry date 10/27/99]

11/01/99	2	NOTICE of designation under Local Rule 3.05 - TRACK 2. (ctc) (smb) (Entry date 11/02/99)
11/12/99	--	SUMMONS (ES) issued for Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock. Consent(s) issued. (smb) [Entry date 11/15/99]
12/20/99	3	RETURN OF SERVICE executed as to Marco Chan 12/8/99. Answer due on 12/28/99 for Marco Chan. (smb) [Entry date 12/21/99]
12/20/99	4	RETURN OF SERVICE executed as to Scott Bunker 12/8/99. Answer due on 12/28/99 for Scott Bunker (smb) [Entry date 12/21/99]
12/20/99	5	RETURN OF SERVICE executed as to Susan Matlock 12/8/99. Answer due on 12/28/99 for Susan Matlock (smb) [Entry date 12/21/99]
12/20/99	6	RETURN OF SERVICE executed as to Susan Martin 12/8/99. Answer due on 12/28/99 for Susan Martin. (smb) [Entry date 12/21/99]
12/20/99	7	RETURN OF SERVICE executed as to Mary Alice Taylor 12/8/99. Answer due on 12/28/99 for Mary Alice Taylor (smb) [Entry date 12/21/99]

12/20/99	8	RETURN OF SERVICE executed as to Ardy Piazza 12/8/99. Answer due on 12/28/99 for Ardy Piazza (smb) [Entry date 12/21/99]
12/20/99	9	RETURN OF SERVICE executed as to Teri Galloway 12/8/99. Answer due on 12/28/99 for Teri Galloway (smb) (Entry date 12/21/99]
12/20/99	10	RETURN OF SERVICE executed as to Lou Fusco 12/8/99. Answer due on 12/28/99 for Lou Fusco (smb) [Entry date 12/21/99]
12/20/99	11	RETURN OF SERVICE executed as to Federal Express Corp. 12/8/99. Answer due on 12/28/99 for Federal Express Corp. (smb) [Entry date 12/21/99]
12/20/99	12	CERTIFICATE OF SERVICE of [2-1] track 2 notice by Gerald D. Freeman. (smb) [Entry date 12/21/99]
1/05/00	13	Return of service unexecuted as to Mary Alice (McKee) Taylor. (smb) [Entry date 01/06/00]
1/05/00	--	SUMMONS(ES) issued for Mary Alice Taylor. Consent(s) issued. (smb) [Entry date 01/06/00]
1/18/00	14	RETURN OF SERVICE executed as to Mary Alice Taylor 1/7/00. Answer due on 1/27/00 for Mary Alice Taylor (smb) [Entry date 01/19/00]

1/18/00 15 CERTIFICATE OF SERVICE of [2-1] track 2 notice (as to Mary Alice Taylor) by Gerald D. Freeman (smb) [Entry date 01/19/00]

1/19/00 16 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman for leave to file memo in excess of twenty pages Note: This documents stricken and returned pursuant to order [19-1] entered 1/27/00. (smb) [Entry date 01/20/00] [Edit date 01/28/00]

1/27/00 17 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman to certify as a nationwide class action suit under Fair Labor Standard Act. Document stricken per order [23-1] dated 2/3/00. (smb) [Entry date 01/27/00] [Edit date 02/03/00]

1/27/00 18 MEMORANDUM by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman in support of [17-1] motion to certify as a nationwide class action suit under Fair Labor Standard Act. Document stricken per order [23-1] dated 2/3/00. (smb) [Entry date 01/27/00] [Edit date 02/03/00]

1/27/00 19 ORDER striking [16-1] motion for leave to file memo in excess of twenty pages. The clerk is directed to return said document to the submitting party with a copy of this order.

(Signed by Judge Henry L. Adams Jr.) ctc (jnb) [Entry date 01/28/00]

1/31/00 20 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman for leave to reconsider [19-1] order (smb) [Entry date 02/01/00]

1/31/00 21 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman for leave to amend the pleadings ([1-1] complaint); replacement pages attached. (smb) [Entry date 02/01/00]

1/31/00 22 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman to reconsider leave to file memorandum in excess of twenty pages (smb) [Entry date 02/01/00]

2/03/00 23 ORDER striking [17-1] motion to certify as a nationwide class action suit under Fair Labor Standard Act, striking [18-1] support memorandum and the Clerk is directed to return said documents to the submitting party with a copy of this order. (Signed by Judge Henry L. Adams Jr.) ctc (smb) [Entry date 02/03/00]

2/07/00 24 NOTICE of filing original copy of Letter to Sue by Kathy L. Creamer; letter attached. (smb) [Entry date 02/08/00]

2/07/00 25 MOTION by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to dismiss plaintiff's complaint, or, alternatively, to strike [1-1] complaint in toto (smb) [Entry date 02/08/00]

2/07/00 26 MEMORANDUM by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock in support of [25-1] motion to dismiss plaintiff's complaint, [25-2] motion to strike [1-1] complaint in toto. (smb) [Entry date 02/08/00]

2/10/00 27 APPLICATION of Non-Resident Counsel and Designation of Local Counsel as to Federal Express Corp . Local Counsel: Cathy Beveridge. Non-Resident Counsel: Thomas W. Murrey. (smb) [Entry date 02/11/00]

2/10/00 28 APPLICATION of Non-Resident Counsel and Designation of Local Counsel as to Federal Express Corp. Local Counsel: Cathy Beveridge. Non-Resident Counsel: James R. Mulroy II. (smb) [Entry date 02/11/00]

2/14/00 29 ORDER striking [20-1] motion for leave to reconsider [19-1] order, striking [21-1] motion for leave to amend the pleadings ([1-1] complaint), striking [22-1] motion to reconsider leave to file memorandum in excess of twenty pages. The Clerk is directed to return said documents to the sumbitting party

with a copy of this order. (Signed by Judge Henry L. Adams Jr.) ctc (smb) [Entry date 02/15/00]

2/14/00 30 MOTION by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock with memorandum in support to strike exhibits submitted in support of plaintiffs' motion to certify class (smb) [Entry date 02/15/00]

2/14/00 31 MEMORANDUM by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock in opposition to [17-1] motion to certify as a nationwide class action suit under Fair Labor Standard Act (smb) [Entry date 02/15/00]

2/18/00 32 ORDER granting [27-1] counsel designation. (Signed by Judge Henry L. Adams Jr.) ctc (smb)

2/18/00 33 ORDER granting [28-1] counsel designation. (Signed by Judge Henry L. Adams Jr.) ctc (smb)

2/22/00 34 NOTICE of filing original copy of limited power of attorney by Wayne C. Tate; attachment. (smb) [Entry date 02/23/00]

2/22/00 35 RESPONSE by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer to [25-1] motion to dismiss plaintiff's

complaint, [25-2] motion to strike [1-1] complaint in toto. (smb) [Entry date 02/23/00]

2/22/00 36 MEMORANDUM by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer in opposition (in support of answer) to [25-1] motion to dismiss plaintiff's complaint, [25-2] motion to strike [1-1] complaint in toto (smb) [Entry date 02/23/00]

2/25/00 37 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman for reconsideration of [29-1] order (smb) [Entry date 02/28/00]

2/28/00 38 MOTION (APPLICATION) by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer for default judgment against Federal Express Corp, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock (smb)

3/02/00 39 NOTICE of filing change of address by Ronald Clausnitzer. (smb) [Entry date 03/03/00]

3/06/00 40 MOTION (APPLICATION) by Wayne C. Tate, William G. Krolman for default judgment against Federal Express Corp, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock (smb) [Entry date 03/07/00]

3/13/00 41 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [37-1] motion for reconsideration of [29-1] order ruling on motion to amend the pleadings. (smb) [Entry date 03/14/00]

3/13/00 42 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [40-1] motion for default judgment against Federal Express Corp, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock, [38-1] motion for default judgment against Federal Express Corp, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock. (smb) [Entry date 03/14/00]

3/17/00 43 APPLICATION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman for default judgment against Mary Alice Taylor (smb) [Entry date 03/20/00]

3/17/00 44 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [42-1] application for order of default judgment. (smb) [Entry date 03/20/00]

3/31/00 45 RESPONSE by Mary Alice Taylor to [43-1] motion for default judgment against Mary Alice Taylor. (smb) [Entry date 04/03/00]

4/03/00 46 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman for reconsideration of [17-1] motion to certify as a nationwide class action suit under Fair Labor Standard Act (smb) [Entry date 04/04/00]

4/03/00 47 MEMORANDUM by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L Creamer, William G. Krolman in support of [46-1] motion for reconsideration of [17-1] motion to certify as a nationwide class action suit under Fair Labor Standard Act. (smb) [Entry date 04/04/00]

4/18/00 48 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman with memorandum in support for sanctions (rm) [Entry date 04/19/00]

5/01/00 49 ORDER TO SHOW cause for lack of filing case management report within the time prescribed: Response due on 5/18/00 for Susan Matlock, for Lou Fusco, for Ardy Piazza, for Teri Galloway, for Susan Martin, for Scott Bunker, for Marco Chan, for Mary Alice Taylor, for Federal Express Corp, for William G. Krolman, for Kathy L. Creamer, for Wayne C. Tate, for Ronald Clausnitzer, for Vincent J. Maccia, for Gerald D. Freeman

(Signed by Judge Henry L. Adams Jr.) ctc (smb) [Entry date 05/02/00]

5/04/00 50 NOTICE of non-service of plaitniffs' motion for sanctions under Rule 11(b) and plaintiffs' motion and memorandum in support of plaintiffs' motion to rconsider motion to certify as a nationswide class action suit by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock (smb) [Entry date 05/05/00]

5/08/00 -- Order to show cause [49-1] addressed to Ronald Clausnitzer returned marked as insufficient address. (smb) [Entry date 05/09/00]

5/10/00 51 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [46-1] motion for reconsideration of [17-1] motion to certify as a nationwide class action suit under Fair Labor Standard Act (smb) [Entry date 05/11/00]

5/10/00 52 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [48-1] motion for sanctions. (smb) [Entry date 05/11/00]

5/11/00 53 RESPONSE to show cause order filed by plaintiff Gerald D. Freeman, plaintiff Vincent

J. Maccia, plaintiff Ronald Clausnitzer, plaintiff Wayne C. Tate, plaintiff Kathy L. Creamer, plaintiff William G. Krolman (jlh) [Entry date 05/12/00]

5/15/00 54 RESPONSE to show cause order filed by defendant Federal Express Corp, defendant Mary Alice Taylor, defendant Marco Chan, defendant Scott Bunker, defendant Susan Martin, defendant Teri Galloway, defendant Ardy Piazza, defendant Lou Fusco, defendant Susan Matlock (smb) [Entry date 05/16/00]

5/17/00 55 MOTION (REQUEST) by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman for a preliminary injunction (smb) [Entry date 05/18/00]

5/22/00 56 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman with memorandum in support for sanctions (smb) [Entry date 05/23/00]

5/22/00 57 ORDER discharging [49-1] order; parties shall file a case Management Report within 15 days (Signed by Judge Henry L. Adams Jr.) ctc (ejw) [Entry date 05/23/00]

5/25/00 58 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman to

strike [52-1] motion response, [51-1] motion response (smb) [Entry date 05/26/00]

6/01/00 59 NOTICE OF CASE REASSIGNMENT to the Honorable Judge James D. Whittemore. ctc (mrh)

6/05/00 60 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [55-1] request for a preliminary injunction. (smb) [Entry date 06/06/00]

6/05/00 61 NOTICE of non-service of plaintiffs' motion for sanctions and plaintiffs' motion to strike, or alternative, to stricken defendants' 5/10/00 untimely and falsely premised responses by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock (smb) [Entry date 06/06/00]

6/07/00 -- Order [57-1] addressed to Ronald Claunitzer returned marked: Return to sender, insufficient address. (smb) [Entry date 06/08/00]

6/07/00 62 CASE MANAGEMENT REPORT (smb) [Entry date 06/08/00]

6/12/00 63 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [56-1] motion for sanctions. (smb) [Entry date 06/13/00]

6/12/00 64 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [58-1] motion to strike [52-1] motion response, [51-1] motion response. (smb) [Entry date 06/13/00]

6/15/00 65 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman to redesignate case (smb) [Entry date 06/16/00]

6/22/00 66 ORDER denying [65-1] motion to redesignate case without prejudice pending determination of class certification by the Court. (Signed by Judge James D. Whittemore) ctc (smb)

7/10/00 67 NOTICE of filing corrected exhibit A to defendants' notice of non-service of plaintiff's motion for sanctions and plaintiffs' motion to strike, or alternatively, to stricken defendants' 5/10/00 untimely and falsely premised responses by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock; exhibit attached. (smb) [Entry date 07/11/00]

7/18/00 68 THIRD MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman with memorandum in support (third) for sanctions under Rule 11(b)(1)(2)(3)(4) (smb) [Entry date 07/19/00]

7/18/00 69 NOTICE of filing exhibit by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman; attachment. (smb) [Entry date 07/19/00]

7/27/00 70 ADDENDUM NOTICE of filing by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman. (smb) [Entry date 07/28/00]

7/27/00 71 FOURTH MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman with memorandum in support (fourth) for sanctions (smb) [Entry date 07/28/00]

8/03/00 72 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [68-1] third motion for sanctions under Rule 11(b)(1)(2)(3)(4) (ag) [Entry date 08/04/00]

8/08/00 73 NOTICE OF CASE REASSIGNMENT to the Honorable Judge James S. Moody Jr. ctc (eec)

8/10/00 74 AMENDED NOTICE OF CASE REASSIGNMENT to the Honorable Judge James S. Moody Jr. ctc (eec)

8/10/00 75 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker,

Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [71-1] motion (fourth) for sanctions (smb) [Entry date 08/11/00]

8/14/00 76 FIFTH MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman (fifth) for sanctions under Rule 11(b)(1)(2)(3)(4) (smb) [Entry date 08/15/00]

8/28/00 77 MOTION by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to extend time to repond to motions for sanctions, and for hearing (jlh) Modified on 09/07/00 [Entry date 08/29/00] [Edit date 09/07/00]

9/07/00 -- MOTION(S) no longer referred: [77-1] motion to extend time to repond to motions for sanctions, [77-2] motion for hearing (aw)

9/11/00 78 SIXTH MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer and William G. Krolman with memorandum in support (sixth) for sanctions under Rule 11(b)(1)(2)(3)(4) . (sak) [Entry date 09/12/00]

9/11/00 79 RESPONSE by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer and William G. Krolman to [77-1] motion to extend time to repond to motions for sanctions and [77-2]

motion for hearing. (sak) [Entry date 09/12/00]

9/11/00 80 NOTICE of filing Local Rule 3.01(g) certification of facts later discovered but not subsequently withdrawn by Defendants' counsel by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer and William G. Krolman. (sak) [Entry date 09/12/00]

9/13/00 81 SEVENTH MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer and William G. Krolman with memorandum in support (seventh) for sanctions under Rule 11(b)(1)(2)(3)(4). (sak) [Entry date 09/14/00]

9/25/00 82 ORDER that the complaint against all individual defendants is dismissed with prejudice, the remainder of the complaint relating to Federal Express Corporation is dismissed without prejudice and the plaintiffs are given 20 days in which to file an amended complaint set amended complaint deadline at 10/23/00 for William G. Krolman, for Kathy L. Creamer, for Wayne C. for Ronald Clausnitzer, for Vincent J. Maccia, for Gerald Freeman denying as moot [78-1] sixth motion for sanctions under Rule 11(b)(1)(2)(3)(4), denying as moot [77-1] motion to extend time to repond to motions for sanctions, denying as moot [77-2] motion for hearing, denying as moot [76-1] fifth motion for sanctions under Rule 11(b)(1)(2)(3)(4), denying as moot [71-1]

fourth motion for sanctions, denying as moot [68-1] third motion for sanctions under Rule 11(b)(1)(2)(3)(4), denying as moot [58-1] motion to strike [52-1] motion response, [51-1] motion response, denying as moot [56-1] motion for sanctions, denying as moot [55-1] motion for a preliminary injunction, denying as moot [48-1] motion for sanctions, denying as moot [46-1] motion for reconsideration of [17-1] motion to certify as a nationwide class action suit under Fair Labor Standard Act, denying as moot [43-1] motion for default judgment against Mary Alice Taylor, denying as moot [40-1] motion for default judgment against Federal Express Corp, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock, denying as moot [38-1] motion for default judgment against Federal Express Corp, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock, denying as moot [37-1] motion for reconsideration of [29-1] order, denying as moot [30-1] motion to strike exhibits submitted in support of plaintiffs' motion to certify class (Signed by Judge James S. Moody Jr.) ctc (rm) [Entry date 09/26/00]

10/10/00 83 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C. Tate, Kathy L. Creamer, William G. Krolman for reconsideration of [82-1] order set amended complaint deadline at 10/23/00 for William G. Krolman, for Kathy L. Creamer, for Wayne C. for Ronald Clausnitzer, for Vincent J.

Maccia, for Gerald Freeman , or alternatively to certify such three questions for appeal before the Court of Appeals (jlh)

10/13/00 85 NOTICE of filing corrections to request for reconsideration of order dated 09/25/00 or, in the alternative, to certify such 3 questions for appeal by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer (crb) [Entry date 10/16/00]

10/16/00 84 ORDER denying [83-1] motion for reconsideration of [82-1] order set amended complaint deadline at 10/23/00 for William G. Krolman, for Kathy L. Creamer, for Wayne C. for Ronald Clausnitzer, for Vincent J. Maccia, for Gerald Freeman, denying [83-2] motion to certify such three questions for appeal before the Court of Appeals (Signed by Judge James S. Moody Jr.) ctc (jlh)

10/16/00 86 MOTION by Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan with memorandum in support for certification , and for entry of final judgment under Federal Rules civil Procedure Rule 54(b) (wlb) [Entry date 10/17/00]

10/20/00 87 NOTICE of voluntary dismissal without prejudice by Wayne C. Tate. (sak) [Entry date 10/23/00]

10/24/00 88 RESPONSE by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Wayne C.

Tate, Kathy L. Creamer, William G. Krolman to [86-1] motion for certification, [86-2] motion for entry of final judgment under Federal Rules civil Procedure Rule 54(b) (wlb) [Entry date 10/25/00]

10/24/00 89 NOTICE OF INTERLOCUTORY APPEAL by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer re: [84-1] order, [82-1] order set amended complaint deadline at 10/23/00 for William G. Krolman, for Kathy L. Creamer, for Wayne C. for Ronald Clausnitzer, for Vincent J. Maccia, for Gerald Freeman. Filing fee $ 105.00; Receipt # T006944 information form due 11/7/00 ctc (plk) [Entry date 10/26/00] [Edit date 02/22/2001]

10/26/00 -- TRANSMITTAL of initial appeal package to USCA consisting of certified copies of notice of appeal, docket sheet, order/judgment being appealed, and motion, if applicable, re: [89-1] appeal. Transcript information form sent. (plk)

11/02/00 -- NOTICE dated 10/30/00 assigning 11th Circuit case number re: [89-1] appeal. USCA case #: 00-15705-E (crs) [Entry date 11/03/00]

11/03/00 -- CORRESPONDENCE from appellant as to receiving back his 25 copies of notice of appeal. He indicated that the copies have been sent certified mail to the all defendants. Letter placed on left side of file folder. (crs) [Entry date 11/06/00]

11/06/00 91 ORDER denying [81-1] motion (seventh) for sanctions under Rule 11(b)(1)(2)(3)(4) (Signed by Judge James S. Moody Jr.) ctc (jlh) [Entry date 11/07/00]

11/07/00 90 TRANSCRIPT INFORMATION FORM filed re: [89-1] appeal; transcript not requested; Certificate of readiness due 11/21/00. USCA # 00-15705-E (crs)

11/13/00 92 AMENDED NOTICE OF INTERLOCUTORY APPEAL by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer re: [82-1] order set amended complaint deadline at 10/23/00; [84-1] order denying motion for reconsideration; [91-1] order denying motion (seventh) for sanctions under Rule 11 (b)(1)(2)(3)(4) ctc (crs) [Entry date 11/14/00] [Edit date 02/22/2001]

11/13/00 -- TRANSMITTAL of initial appeal package to USCA consisting of certified copies of amended notice of appeal, docket sheet, order/judgment being appealed, and motion, if applicable, re: [92-1] appeal. USCA #00-15705-E (crs) [Entry date 11/14/00]

11/22/00 -- ACKNOWLEDGMENT by USCA of receiving copy of notice of amended appeal on 11/17/00 re: [92-1] appeal. USCA # 00-15705-E (crs) [Entry date 11/24/00]

11/27/00 93 ORDER TO SHOW cause why action should not be dismissed for failure to prosecute:

Response due on 12/11/00 for William G. Krolman, for Kathy L. Creamer, for Ronald Clausnitzer, for Vincent J. Maccia, for Gerald D. Freeman. Failure to file an amended complaint or establish satisfactory cause shall result in this action being dismissed without further notice. (Signed by Judge James S. Moody Jr.) ctc (ch)

11/27/00 -- DEADLINE updated pursuant to [93-1] order; reset amended complaint deadline at 12/11/00 for William G. Krolman, for Kathy L. Creamer, for Ronald Clausnitzer, for Vincent J. Maccia, for Gerald D. Freeman (ch)

11/29/00 94 RESPONSE to show cause order filed by plaintiff Gerald D. Freeman, plaintiff Vincent J. Maccia, plaintiff Ronald Clausnitzer, plaintiff Kathy L. Creamer, plaintiff William G. Krolman (ch) [Entry date 11/30/00]

11/29/00 95 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer, William G. Krolman to stay pending appeal (ch) [Entry date 11/30/00]

12/07/00 -- TRANSMITTAL to USCA re: [92-1] appeal forwarding original response to plaintiff's motion, filed in District Court in error. USCA # 00-15705-E (Clerk B. Wiegman USCA, instructed Clerk C. Slemmer to forward the response to the 11th Circuit) (crs)

12/07/00 -- TRANSMITTAL to USCA re: forwarding original response to plaintiff's motion filed in

District Court in error. USCA # 00-15705-E (cdm) [Entry date 12/12/00]

12/11/00 96 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [95-1] motion to stay pending appeal (ch) [Entry date 12/12/00]

12/12/00 97 NOTICE of filing exhibit A to defendants' response to plaintiffs' motion for stay pending appeal by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock (ch) [Entry date 12/13/00]

12/13/00 -- ENDORSED ORDER denying [95-1] motion to stay pending appeal (Signed by Judge James S. Moody Jr.) ctc (mrh) [Entry date 12/14/00]

12/14/00 -- TRANSMITTAL to USCA re: [92-1] appeal forwarding certified copy of order denying motion to stay pending appeal USCA # 00-15705-E (cdm)

12/15/00 -- ACKNOWLEDGMENT by USCA of receiving the original response to plaintiff's motion filed in District Court in error on re: [89-1] appeal USCA # 00-15705-E (dlg) [Entry date 12/18/00]

12/26/00 98 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L.

Creamer for reconsideration of [95-1] motion to stay pending appeal (ch) [Entry date 12/27/00]

12/27/00 -- TRANSMITTAL to USCA re: [92-1] appeal forwarding certified copy of motion to reconsider stay pending appeal USCA # 00-15705-E (cdm)

1/04/01 -- REQUEST by USCA to forward copies of documents #86, 87 and 93 re: [92-1] appeal, [89-1] appeal. USCA # 00-15705-EE (crs)

1/04/01 -- TRANSMITTAL to USCA re: [92-1] appeal, [89-1] appeal forwarding copies of documents #86, 87 and 93 per request. USCA # 00-15705-EE (crs)

1/04/01 99 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [98-1] motion for reconsideration of [95-1] motion to stay pending appeal (ch) [Entry date 01/05/01]

1/09/01 -- TRANSMITTAL to USCA re: [92-1] appeal, [89-1] appeal forwarding copy of defendant's response to plaintiff's motion to reconsider stay pending appeal. USCA # 00-15705-EE (crs)

1/16/01 -- ACKNOWLEDGMENT by USCA of receiving certified copies of motion to reconsider stay pending appeal under FRAP

Rule 8(a) and updated docket sheet on 1/2/01 re: [92-1] appeal USCA # 00-15705-E (dlg)

1/22/01 100 CERTIFICATE of readiness with certified copies of indexed district court docket sheet sent to USCA re: [92-1] appeal (ROA consists of: Volume pleadings: 2;) USCA# 00-15705-EE (crs)

1/22/01 -- ACKNOWLEDGMENT by USCA of receiving copies of documents #86, 87,and 93 as requested on 1/9/01 re: [92-1] appeal. USCA # 00-15705-EE (crs)

1/25/01 101 ORDER denying [86-1] motion for certification, denying [86-2] motion for entry of final judgment under Federal Rules Civil Procedure Rule 54(b) (Signed by Judge James S. Moody Jr.) ctc (ch) [Entry date 01/26/01]

1/26/01 102 ORDER denying [98-1] motion for reconsideration of [95-1] motion to stay pending appeal. Plaintiffs may file an amended complaint within 15 days from the date of this order. (Signed by Judge James S. Moody Jr.) ctc (ch) [Entry date 01/29/01]

1/29/01 -- ACKNOWLEDGMENT by USCA of receiving certificate of readiness on 1/25/01 re: [92-1] appeal. USCA # 00-15705-EE (crs)

1/31/01 -- TRANSMITTAL to USCA re: [92-1] appeal forwarding copy of order denying motion for reconsideration of motion to stay pending appeal. USCA # 00-15705-EE (crs)

2/02/01 -- ACKNOWLEDGMENT by USCA of receiving copy of defendant's response to plaintiff's motion to reconsider stay pending appeal on 1/12/01 re: [89-1] appeal USCA # 00-15705-EE (dlg)

2/08/01 -- ACKNOWLEDGMENT by USCA of receiving copy of order denying motion for reconsideration of motion to stay pending appeal on 2/2/01 re: [92-1] appeal. USCA # 00-15705-EE (crs) [Entry date 02/09/01]

2/09/01 103 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer to extend time to file an amended complaint (ch) [Entry date 02/12/01]

2/12/01 -- REQUEST by USCA to forward record on appeal re: [89-1] appeal, [92-1] appeal. USCA # 00-15705-EE (crs) [Entry date 02/13/01]

2/13/01 -- RECORD ON APPEAL sent to USCA re: [89-1] appeal, [92-1] appeal Transmittal includes: (ROA consists of: Volumes of pleadings: 2;) USCA# 00-15705-EE (crs)

2/20/01 104 ORDER granting in part, denying in part [103-1] motion to extend time to file an amended complaint, reset amended complaint deadline at 3/9/01 for William G. Krolman, for Kathy L. Creamer, for Ronald Clausnitzer, for Vincent J. Maccia, for Gerald D. Freeman (Signed by Judge James S. Moody Jr.) ctc (ch) [Entry date 02/21/01]

2/20/01 -- ACKNOWLEDGMENT by USCA of receiving record on appeal on 2/15/01 re: [89-1] appeal. USCA # 00-15705-EE (crs) [Entry date 02/22/01]

2/22/01 105 APPEARANCE of non-resident counsel and designation of local counsel as to Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer, William G. Krolman . Local counsel: Nevin A. Weiner. Non-resident counsel: David L. Rose. (ch) [Entry date 02/23/01]

2/22/01 106 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer, William G. Krolman for Linda Y. Sroufe to appear pro hac vice (ch) [Entry date 02/23/01]

2/22/01 107 MOTION by William G. Krolman to extend time to file an amended complaint (ch) [Entry date 02/23/01]

2/22/01 108 MOTION by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock with memorandum in support for reconsideration of [104-1] order (ch) [Entry date 02/23/01]

2/28/01 109 ORDER denying [106-1] motion for Linda Y. Sroufe to appear pro hac vice with leave to refile for failure to comply with Local Rule 2.02(a), which, among other things, requires the written consent of the designee prior to

appointment. (Signed by Judge James S. Moody Jr.) ctc (wlb) [Entry date 03/02/01]

3/06/01 110 RESPONSE by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock to [107-1] motion to extend time to file an amended complaint (cdm) [Entry date 03/07/01]

3/06/01 111 APPEARANCE of non-resident counsel and designation of local counsel as to Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer, William G. Krolman . Local counsel: Nevin Weiner Non-resident counsel: David L. Rose (cdm) [Entry date 03/07/01]

3/06/01 112 AMENDED COMPLAINT by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer, William G. Krolman amending [1-1] complaint (Answer due 3/20/01 for Federal Express Corp) adding Peter W. Crowe, Donna M. Lewis, Michael P. Culp, Kevin McQuillan, Charles Moncalieri, Kenneth Mutchler, Phyllis Nelson, Andy Kubicki, Ann Heffel, Melody Ludwig, Elizabeth Tucker, John Kuenning; jury demand (cdm) [Entry date 03/07/01]

3/14/01 -- ENDORSED ORDER granting [111-1] counsel designation (Signed by Judge James S. Moody Jr.) ctc (rjc)

3/16/01 113 MEMORANDUM by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer, William G. Krolman, Peter W. Crowe, Donna M. Lewis, Michael P. Culp, Kevin McQuillan, Charles Moncalieri, Kenneth Mutchler, Phyllis Nelson, Andy Kubicki, Ann Heffel, Melody Ludwig, Elizabeth Tucker, John Kuenning in opposition to [108-1] motion for reconsideration of [104-1] order (ch) [Entry date 03/19/01]

3/20/01 114 NOTICE to clerk to delete Ann Heffel from list of plaintiffs in amended complaint (ch) [Entry date 03/21/01]

3/22/01 115 MOTION by Federal Express Corp. with memorandum in support for stay pending appeal (mrh) [Entry date 03/23/01]

3/23/01 -- TRANSMITTAL to USCA re: [92-1] appeal forwarding copy of motion by Federal Express for stay pending appeal. USCA # 00-15705-EE (crs)

3/30/01 -- ACKNOWLEDGMENT by USCA of receiving copy of motion by Federal Express to stay pending appeal on 3/27/01 re: [92-1] appeal. USCA # 00-15705-EE (crs) [Entry date 04/02/01]

4/02/01 116 MEMORANDUM by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer, William G. Krolman, Peter W. Crowe, Donna M. Lewis, Michael P. Culp, Kevin McQuillan, Charles Moncalieri,

Kenneth Mutchler, Phyllis Nelson, Andy Kubicki, Ann Heffel, Melody Ludwig, Elizabeth Tucker, John Kuenning in opposition to [115-1] motion for stay pending appeal (ch) [Entry date 04/03/01]

6/08/01 117 ORDER granting [115-1] motion for stay pending appeal, denying without prejudice [108-1] motion for reconsideration of [104-1] order, denying without prejudice [107-1] motion to extend time to file an amended complaint (Signed by Judge James S. Moody Jr.) ctc (ch)

6/11/01 -- TRANSMITTAL to USCA re: [92-1] appeal forwarding copy of order staying case pending appeal. USCA # 00-15705-E (crs) [Entry date 06/11/01]

6/18/01 -- ACKNOWLEDGMENT by USCA of receiving copy of order staying case pending appeal on 6/13/01 re: [92-1] appeal. USCA # 00-15705-E (crs) [Entry date 06/19/01]

2/14/02 118 USCA DECISION (certified copy) [89-1] appeal, [92-1] appeal affirming judgment/order Mandate date: 2/12/02 USCA EOD: 1/14/02 (Opinion attached) USCA # 00-15705-EE (crs)

2/14/02 119 BILL OF COSTS taxed in the amount of $107.00 against appellant, Gerald D. Freeman, et al and payable to appellee, Federal Express Corporation, et al. USCA # 00-15705-EE (crs) [Edit date 02/21/02]

2/14/02 -- RECORD on appeal returned from USCA re: (ROA consists of: Volume pleadings: 2;) USCA# 00-15705-EE (crs)

2/26/02 120 ORDER removing case stay and scheduling status conference set status conference for 1:30 3/25/02 scheduled for Judge James S. Moody Jr. (Signed by Judge James S. Moody Jr.) ctc (jlg)

2/26/02 121 MOTION by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer, William G. Krolman, Federal Express Corp, Peter W. Crowe, Donna M. Lewis, Michael P. Culp, Kevin McQuillan, Charles Moncalieri, Kenneth Mutchler, Phyllis Nelson, Andy Kubicki, Ann Heffel, Melody Ludwig, Elizabeth Tucker, John Kuenning for leave to amend [112-1] amended complaint (Second Amended Complaint attached) (sld) [Entry date 02/27/02]

2/26/02 122 MEMORANDUM OF POINTS AND AUTHORITIES by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer, William G. Krolman, Federal Express Corp, Peter W. Crowe, Donna M. Lewis, Michael P. Culp, Kevin McQuillan, Charles Moncalieri, Kenneth Phyllis Nelson, Andy Kubicki, Ann Heffel, Melody Ludwig, Elizabeth Tucker, John Kuenning in support of [121-1] motion for leave to amend [112-1] amended complaint (Second Amended Complaint attached) (sld) [Entry date 02/27/02]

2/26/02 123 CERTIFICATE OF COMPLIANCE with Local Rule 3.01(g) by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer, William G. Krolman, Federal Express Corp, Peter W. Crowe, Donna M. Lewis, Michael P. Culp, Kevin McQuillan, Charles Moncalieri, Kenneth Mutchler, Phyllis Nelson, Andy Kubicki, Ann Heffel, Melody Ludwig, Elizabeth Tucker, John Kuenning Re: order (sld) [Entry date 02/27/02]

2/26/02 124 CERTIFICATE OF SERVICE of [123-1] compliance certificate, [122-1] support memorandum, [121-1] motion for leave to amend [112-1] amended complaint, Second Amended Complaint and proposed order by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer, William G. Krolman, Federal Express Corp, Peter W. Crowe, Donna M. Lewis, Michael P. Culp, Kevin McQuillan, Charles Moncalieri, Kenneth Phyllis Nelson, Andy Kubicki, Ann Heffel, Melody Ludwig, Elizabeth Tucker, John Kuenning (sld) [Entry date 02/27/02]

3/04/02 125 MOTION by Federal Express Corp, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, Susan Matlock with memorandum in support to administratively close and stay all proceedings until closure (ch) [Entry date 03/05/02]

3/13/02 126	NOTICE to Court regarding plaintiffs' motion for leave to amend by Federal Express Corp, et al. (ch) [Entry date 03/14/02]
3/18/02 127	RESPONSE by Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer, William G. Krolman, Peter W. Crowe, Donna M. Lewis, Michael P. Culp, Kevin McQuillan, Charles Moncalieri, Kenneth Mutchler, Phyllis Nelson, Andy Kubicki, Ann Heffel, Melody Ludwig, Elizabeth Tucker, John Kuenning in opposition to [125-1] motion to administratively close and stay all proceedings until closure (ch) [Entry date 03/19/02]
3/25/02 128	STATUS CONFERENCE held on 3/25/02 on pending motions before Judge James S. Moody Jr. Court Reporter: Debbie Flatow Order to follow. (ch)
3/28/02 129	ORDER directing administrative closure. Order [82-1] of 9/25/00 of this Court became final on 10/23/00. (Signed by Judge James S. Moody Jr.) ctc (ch)
6/07/02 130	TRANSCRIPT of oral argument hering held on 3/25/02 before Judge James S. Moody, Jr.. Transcript filed separately. (ch)

Case Flags:

ADMCLO

JA 148

TGW

END OF DOCKET: 8:99cv2466

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Eleventh Circuit provides by rule that unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition or motion. Eleventh Circuit Rules, Rule 36-2, 28 U.S.C.A.)

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

Gerald D. Freeman
v.
Federal Express Corp. [FN*]

NO. 00-15705

January 14, 2002

Appeal from: M.D.Fla., No. 9902466CIVT30B

Affirmed

FN* Fed.R.App.P. 34(a); 11th Cir.R. 34-3

31 Fed.Appx. 929 (Table), 2002 WL 187185 (11th Cir.(Fla.))

END OF DOCUMENT

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER

☒FEPA PCO#9607-02545
☒EEOC 15B960120(C)

Clearwater Human Relations Department and EEOC
(*State or local Agency, if any*)

NAME (Indictate Mr., Ms., or Mrs.)
Mr. Gerald D. Freeman

HOME TELEPHONE NO. (Include Area Code)
(813) 733-2053

STREET ADDRESS CITY, STATE AND ZIP CODE
2700 Bayshore Blvd. #5105 Dunedin, FL 34698

COUNTY
Pinellas

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more than one list below.)*

NAME NO. OF EMPLOYEES/MEMBERS
Federal Express Corporation 20+

TELEPHONE NUMBER (Include Area Code)
(813) 736-6727

STREET ADDRESS
1881 Main Street

CITY, STATE AND ZIP CODE
Dunedin, FL 34698

CAUSE OF DISCRIMINATION BASED ON
(Check appropriate box(es))
☒ AGE

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE
(Month, day, year)
April 22, 1996 & continuing

THE PARTICULARS ARE (*If additional space is needed, attached extra sheet(s)):*

I. STATEMENT OF HARM:
I am being subjected to disparate treatment and harassed into voluntary retirement. I have been employed by Federal Express Corporation since September 27, 1982. My current position is Courier.

II. RESPONDENT'S REASON FOR ADVERSE ACTION:
No reasons have been given.

III. STATEMENT OF DISCRIMINATION:
I believe that I have been subjected to unlawful discrimination on the basis of my age (45) in violation of the Age Discrimination in Employment Act.

☒ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and

I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date: July 8, 1996 /s/Gerald S. Freeman
Charging Party (Signature)

NOTARY - When necessary to meet State and Local Requirements)
/s/

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
/s/Gerald S. Freeman

SUBSCRIBED AND SWORN BEFORE ME THIS DATE
(Day, month, and year)
08 JUL '96 [NOTARY STAMP]

EEOC FORM 161 (10/96)

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To:

Gerald D. Freeman
2700 Bayshore Blvd #5106
Dunedin, Florida 34698-1659

From:

U.S. Equal Employment Opportunity Commission
Tampa Area Office
501 E. Polk Street, Room 1020
Tampa, Florida 33602

* * *

Charge No.	EECO Representative	Telephone No.
15B960120	Sylvia Pouncy	(813) 228-2310

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

* * *

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

* * *

- NOTICE OF SUIT RIGHTS -
(See the additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the respondent(s) named in the charge. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice. Otherwise your right to sue based on the above-numbered charge will be lost.

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible. (If you file suit, please send a copy of your court complaint to this office.)

On behalf of the Commission

/s/
Manuel Zurita, Area Director

9-15-99
(Date Mailed)

Enclosure
Copy of Charge

cc: CoAnn Sims Ressler
Sr EEO Specialist
FedEx
2600 Nonconnah Suite 100
Memphis, TN 38132

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY	CHARGE NUMBER
⊠EEOC	151980767

* * *

NAME (Indictate Mr., Ms., or Mrs.)
Mr. Vincent J. Maccia

HOME TELEPHONE NO. (Include Area Code)
(813) 934-2914

STREET ADDRESS	CITY, STATE AND ZIP CODE
216 Earl Street	Tarpon Springs, FL 34689

DATE OF BIRTH
[REDACTED]/45

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more than one list below.)*

NAME	TELEPHONE NUMBER
Federal Express Corporation	(813) 736-6727

STREET ADDRESS	CITY, STATE AND ZIP CODE
1881 Main Street	Dunedin, FL 34698

COUNTY
103

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☒ RETALIATION

DATE DISCRIMINATION TOOK PLACE

EARLIEST	*LATEST*
02/04/98	02/05/98

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s))*:

I. PERSONAL HARM:
On February 4, 1998, I was called on the "Dads" unit, and told I had a meeting with Mike Goodling at 1600 hrs", per my supervisor. I was not given any relief to assist with my deliveries. I was told I could not meet later, and I could not have any late deliveries. While in the meeting with Mike Goodling, I was questioned about my reasons for filing an "external EEO complaint". I did not answer any questions on the advise of my attorney.

II. RESPONDENT'S REASON(S) FOR ADVERSE ACTION(S):
I was not given any reason for the meeting with Mike Goodling. I was not given any reason for not being given a relief to assist with my deliveries. I was not given any reason for the harassment.

III. DISCRIMINATION STATEMENT:
I believe I have been retaliated against for filing a previous age discrimination charge (EEOC #15B970133), in violation of the Age Discrimination in Employment Act of 1967.

NOTARY - When necessary to meet State and Local Requirements)
/s/_____

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
/s/Vincent J. Maccia

SUBSCRIBED AND SWORN BEFORE ME THIS DATE
(Day, month, and year)
3rd April 98 [NOTARY STAMP]

EEOC FORM 161 (10/96)

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To:

Mr. Vincent J. Maccia
216 Earl Street
Tarpon Springs, Florida 34689

From:

U.S. Equal Employment Opportunity Commission
Tampa Area Office
501 E. Polk Street, Room 1020
Tampa, Florida 33602

* * *

Charge No.	EECO Representative	Telephone No.
151980767	Sylvia Pouncy, Supervisor	(813) 228-2310

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

* * *

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

* * *

- NOTICE OF SUIT RIGHTS -
(See the additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the respondent(s) named in the charge. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice. Otherwise your right to sue based on the above-numbered charge will be lost.

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible. (If you file suit, please send a copy of your court complaint to this office.)

On behalf of the Commission

/s/
Manuel Zurita, Area Director

8-2-99
(*Date Mailed*)

Enclosure
Copy of Charge

cc: Ms. CoAnn Sims Ressler
Sr. EEO Specialist
Federal Express
Post Office Box 727
Memphis, Tennessee 38194-2440

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY	CHARGE NUMBER
⊠EEOC	151970705

* * *

NAME (Indictate Mr., Ms., or Mrs.)
Mr. Ronald Clausnitzer

HOME TELEPHONE NO. (Include Area Code)
(813) 786-6357

STREET ADDRESS	CITY, STATE AND ZIP CODE
533 E. Curlew Road	Tarpon Springs, FL 34689

DATE OF BIRTH
[REDACTED]/55

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more than one list below.)*

NAME	NUMBER OF EMPLOYEES, MEMBERS
Federal Express Corporation	CAT B (101-200)

TELEPHONE NUMBER
(813) 736-6727

STREET ADDRESS	CITY, STATE AND ZIP CODE
1881 Main Street	Dunedin, FL 34698

COUNTY
103

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☒ RETALIATION

DATE DISCRIMINATION TOOK PLACE

EARLIEST	*LATEST*
02/04/98	09/09/97

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s))*:

I. PERSONAL HARM:
On February 4, 1998, I was called twice on my radio and told to re to the station, but given no reason. The third time I was called, I was told I had to meet with Mike Goodling, again given no reason. At the meeting, Mr. Goodling began to ask questions about my filing "an external EEO complaint." I did not answer any questions, on the advise of my attorney.

II. RESPONDENT'S REASON(S) FOR ADVERSE ACTION(S):
I was not given any reason for the "secrecy" as to me returning to the station. I was told by Mike Goodling that he needed to question me to "find out why I filed outside the agency and how we can resolve the matter." I was told by Mike Goodling that I was refusing to cooperate, when I told him I would not answer any questions. I have been given no other reason for this harassment.

III. DISCRIMINATION STATEMENT:
I believe I have been retaliated against for filing a previous age discrimination charge (EEOC #15B970137), in violation of the Age Discrimination in Employment Act of 1967.

NOTARY - When necessary to meet State and Local Requirements)
/s/_____

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
/s/Ronald Clausnitzer

SUBSCRIBED AND SWORN BEFORE ME THIS DATE
(Day, month, and year)
8/23/98 [NOTARY STAMP]

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER
☒FEPA PCO#9709-02750
☒EEOC 15B970137(C)

Clearwater Human Relations Department and EEOC
(*State or local Agency, if any*)

NAME (Indictate Mr., Ms., or Mrs.)
Ronald Clausnitzer (Mr.)

HOME TELEPHONE NO. (Include Area Code)
(813) 786-6357

STREET ADDRESS CITY, STATE AND ZIP CODE
175 Kristen Ct., #418 Palm Harbor, FL 34684

COUNTY
Pinellas

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more than one list below.)*

NAME NO. OF EMPLOYEES/MEMBERS
Federal Express Corporation 15+

TELEPHONE NUMBER
(813) 736-6727

STREET ADDRESS: 1881 Main Street
CITY, STATE AND ZIP CODE: Dunedin, FL 34698

CAUSE OF DISCRIMINATION BASED ON
(Check appropriate box(es))
☒ AGE

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE
(Month, day, year)
September 9, 1997

THE PARTICULARS ARE (*If additional space is needed, attached extra sheet(s)):*

I. STATEMENT OF HARM:

I am being subjected to disparate treatment and harassment by the Respondent. I have been employed by the Respondent since December 3, 1983. My current position is that of Courier.

II. RESPONDENT'S REASON FOR ADVERSE ACTION:

No reasons have been given.

III. STATEMENT OF DISCRIMINATION:

I believe that I have been subjected to unlawful discrimination on the basis of my age (42) in violation of the Age Discrimination in Employment Act.

☑I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 9-22-97 /s/Ronald Clausnitzer
Charging Party (Signature)

NOTARY - When necessary to meet State and Local Requirements)
/s/Demetria I. Pardales

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
/s/Ronald Clausnitzer

SUBSCRIBED AND SWORN BEFORE ME THIS DATE
(Day, month, and year)
9/22/97 [NOTARY STAMP]

EEOC FORM 161 (10/96)

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To:

Mr. Ronal Clausnitzer
275 Kristen Court #418
Palm Harbor, Florida 34684

From:

U.S. Equal Employment Opportunity Commission
Tampa Area Office
501 E. Polk Street, Room 1020
Tampa, Florida 33602

* * *

Charge No.	EECO Representative	Telephone No.
151980705	Sylvia Pouncy, Supervisor	(813) 228-2310

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

* * *

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

* * *

- NOTICE OF SUIT RIGHTS -
(See the additional information attached to this form)

Title VII, the American with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the respondent(s) named in the charge. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice. Otherwise your right to sue based on the above-numbered charge will be lost.

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible. (If you file suit, please send a copy of your court complaint to this office.)

On behalf of the Commission

/s/
Manuel Zurita, Area Director

8-2-99
(Date Mailed)

Enclosure
Copy of Charge

cc: Ms. CoAnn Sims Ressler
Sr. EEO Specialist
Federal Express

EEOC FORM 161 (10/96)

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To:

Mr. Ronald Clausnitzer
275 Kristen Court #418
Palm Harbor, Florida 34684

From:

U.S. Equal Employment Opportunity Commission
Tampa Area Office
501 E. Polk Street, Room 1020
Tampa, Florida 33602

* * *

Charge No.	EECO Representative	Telephone No.
15B970137	Sylvia Pouncy, Supervisor	(813) 228-2310

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

* * *

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

* * *

- NOTICE OF SUIT RIGHTS -
(See the additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the respondent(s) named in the charge. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice. Otherwise your right to sue based on the above-numbered charge will be lost.

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible. (If you file suit, please send a copy of your court complaint to this office.)

On behalf of the Commission

/s/
Manuel Zurita, Area Director

8-2-99
(*Date Mailed*)

Enclosure
Copy of Charge

cc: Ms. CoAnn Sims Ressler
Sr. EEO Specialist
Federal Express
Post Office Box 727
Memphis, Tennessee 38194-2440

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER
☒FEPA PCO#9710-02758
☒EEOC 15B980004(C)

Clearwater Human Relations Department and EEOC
(*State or local Agency, if any*)

NAME (Indictate Mr., Ms., or Mrs.)
Kathy Creamer (Ms.)

HOME TELEPHONE NO. (Include Area Code)
(813) 791-3693

STREET ADDRESS CITY, STATE AND ZIP CODE
603 ~~613~~ Hammock Pine Bl Clearwater, FL 33761

COUNTY
Pinellas

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more than one list below.)*

NAME NO. OF EMPLOYEES/MEMBERS
Federal Express Corporation 15+

TELEPHONE NUMBER
(813) 736-6727

STREET ADDRESS
1881 Main Street

CITY, STATE AND ZIP CODE
Dunedin, FL 34698

CAUSE OF DISCRIMINATION BASED ON
(Check appropriate box(es))
☒ AGE

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE
(Month, day, year)
July 10, 1997

THE PARTICULARS ARE (*If additional space is needed, attached extra sheet(s)):*

I. STATEMENT OF HARM:

I was subjected to disparate treatment, disciplinary actions, and was fired from my position as Courier by the Respondent. I had been employed by the Respondent for sixteen (16) years.

II. RESPONDENT'S REASON FOR ADVERSE ACTION:

I did not meet the Best Practice Pays Program standards of performance.

III. STATEMENT OF DISCRIMINATION:

I believe that I have been subjected to unlawful discrimination on the basis of my age (41) in violation of the Age Discrimination in Employment Act.

☒I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 10-06-97 /s/Kathy Creamer
Charging Party (Signature)

NOTARY - When necessary to meet State and Local Requirements)
/s/Lori L. Reaves

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
/s/Kathy Creamer

SUBSCRIBED AND SWORN BEFORE ME THIS DATE
(Day, month, and year)
10-6-97 [NOTARY STAMP]

EEOC FORM 161 (10/96)

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To:

Ms. Kathy Creamer
603 Hammock Pine Blvd.
Clearwater, Florida 33761

From:

U.S. Equal Employment Opportunity Commission
Tampa Area Office
501 E. Polk Street, Room 1020
Tampa, Florida 33602

* * *

Charge No.	EECO Representative	Telephone No.
15B980004	Sylvia Pouncy, Supervisor	(813) 228-2310

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

* * *

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

* * *

- NOTICE OF SUIT RIGHTS -
(See the additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the respondent(s) named in the charge. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice. Otherwise your right to sue based on the above-numbered charge will be lost.

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible. (If you file suit, please send a copy of your court complaint to this office.)

On behalf of the Commission

/s/
Manuel Zurita, Area Director

8-2-99
(Date Mailed)

Enclosure
Copy of Charge

cc: Ms. CoAnn Sims Ressler
Sr. EEO Specialist
Federal Express
Post Office Box 727
Memphis, Tennessee 38194-2440

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse side before completing this form.

ENTER CHARGE NUMBER
☒FEPA PCO#9712-02812
☒EEOC 15B980052(C)

Clearwater Human Relations Department and EEOC
(*State or local Agency, if any*)

NAME (Indictate Mr., Ms., or Mrs.)
Mr. William G. Krolman

HOME TELEPHONE NO. (Include Area Code)
(417) 624-6786

STREET ADDRESS
3028 Pearl Avenue

CITY, STATE AND ZIP CODE
Joplin, Missouri 64804

COUNTY
Jasper

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more than one list below.)*

NAME
Federal Express Corporation

NO. OF EMPLOYEES/MEMBERS
20+

TELEPHONE NUMBER
(813) 736-6727

STREET ADDRESS	CITY, STATE AND ZIP CODE
1881 Main Street	Dunedin, Pinellas County FL 34698

CAUSE OF DISCRIMINATION BASED ON
(Check appropriate box(es))
☒ AGE
☒ OTHER (*Specify*) Disability

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE
(Month, day, year)
July 3, 1997

THE PARTICULARS ARE (*If additional space is needed, attached extra sheet(s)):*

I. STATEMENT OF HARM:
I was subjected to disparate treatment, not accommodated regarding my disability and terminated from my position as Courier on July 3, 1997.

II. RESPONDENT'S REASON FOR ADVERSE ACTION:
I was told I was terminated due to excessive absenteeism in the previous year.

III. STATEMENT OF DISCRIMINATION:
I believe that I have been discriminated against in violation of Title I of the Americans with Disability Act of 1990; the Age Discrimination in Employment Act; the Florida Civil Rights Act of 1992; and Chapter 70 of the Pinellas County Code on the basis of my Disability and Age (42).

☒ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 12/29/97 /s/William G. Krolman
Charging Party (Signature)

NOTARY - When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
/s/William G. Krolman

SUBSCRIBED AND SWORN BEFORE ME THIS DATE
(Day, month, and year)
12/29/97 [NOTARY STAMP]

EEOC FORM 161 (10/96)

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

ENTER CHARGE NUMBER
☒FEPA PCO#9712-02812
☒EEOC 15B980052(C)

To:

Mr. William G. Krolman
3028 Pearl Avenue
Joplin, Missouri 64804

From:

U.S. Equal Employment Opportunity Commission
Tampa Area Office
501 E. Polk Street, Room 1020
Tampa, Florida 33602

* * *

Charge No.	EECO Representative	Telephone No.
15B980052	Robert Curry, Supervisor	(813) 228-2310

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

* * *

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any

other issues that might be construed as having been raised by this charge.

* * *

- NOTICE OF SUIT RIGHTS -
(See the additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the respondent(s) named in the charge. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice. Otherwise your right to sue based on the above-numbered charge will be lost.

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible. (If you file suit, please send a copy of your court complaint to this office.)

On behalf of the Commission

/s/
Manuel Zurita, Area Director

6/22/99
(*Date Mailed*)

Enclosure
Copy of Charge

cc: Federal Express Corporation

UNITED STATES DISTRICT COURT
Southern District of New York

02-CV-3355 (LMM)

[Filed August 6, 2002]

Paul Holowecki, Patricia Kennedy,	)
Donna M. Lewis, Charles Moncalieri,	)
Phyllis Nelson, Andy Kubicki,	)
Elizabeth Tucker, Steven Almendarez,	)
Frank J. Martinez, Kelly L. Martinez,	)
Kevin McQuillan, Kenneth G. Mutchler,	)
George Robertson, and Nancy Trompics,	)
individually and on behalf of all others	)
similarly situated,	)
	)
Plaintiffs,	)
	)
v.	)
	)
Federal Express Corporation,	)
	)
Defendant.	)
	)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Defendant, Federal Express Corporation ("FedEx"), has moved to dismiss the age discrimination claims of the Plaintiffs, 14 current and former FedEx couriers, on the grounds that the Plaintiffs did not comply with the administrative procedures pursuant to which a state or federal

government agency notify an employers of a charge of discrimination and try to conciliate the charges. FedEx has been on continuous notice of charges of systemic discrimination against older couriers since 1995 and has never conciliated any such charge. The filing of these charges, and a subsequent putative class action, *Freeman et al. v. Federal Express Corporation,* No. 99-2466-Civ-T-30B (M.D. Fla.) provided notice to FedEx and tolled the running of the limitations period. The motion to dismiss should be denied.

STATEMENT OF THE CASE

The following facts alleged in the complaint are to be taken as true for purposes of this motion. Additional facts are supported by Plaintiffs' exhibits, submitted herewith.

1. In late 1994 or early 1995, FedEx adopted a compensation system called "Best Practices Pays" and "Minimum Acceptable Performance Standards." From the time those programs began, FedEx has systematically discriminated to terminate or drive out older couriers, and particularly older couriers who had been injured, while favoring younger couriers. Complaint ¶¶ 13-22. The Complaint in this case describes ten ways in which FedEx implemented and executed a practice of discriminating against older couriers and in favor of younger couriers. Complaint, ¶ 23, a) through j). These practices are carried out throughout the United States and FedEx has continued to follow those practices. Complaint ¶¶ 24-26 and 30. Under Count I, Plaintiffs seek relief under the Age Discrimination in Employment Act, 29 U.S.C. 621, et seq. ("ADEA"). Complaint ¶¶ 1-31. Under Count II, plaintiffs seek relief under the laws of New York, California, Michigan and New Jersey, and seek class action certification under the State laws prohibiting age discrimination. Complaint ¶¶ 33-39.

2. Gerald Freeman has worked for FedEx as a courier in Florida since 1982. On June 6, 1996, he filled out an Intake Questionaire and a four page Affidavit for the EEOC and the Clearwater Human Relations Department, showing that he was born on July 11, 1950, and that for the past sixteen months, that is since February, 1995, FedEx management had attempted to terminate and harass him and "others so situated," that is older couriers and customer service agents, into "voluntary" retirement or termination. Plaintiffs' Exhibit 1 (attached). In that affidavit, he asked "Are all of the things just described being applied evenly to younger employees ? Absolutely not !" *Id.*, p. 3. Based upon that information, he filed a formal charge with the Clearwater Human Relations Department and EEOC on July 6, 1996. Def. Motion to Dismiss, Morrison Dec., Ex. 8.

4. Vincent Maccia, another FedEx courier, filed a similar affidavit in September, 1997, stating that in the last three years there was a "radical change in ethical standards...orchestrated by FedEx Corporate Headquarters in Memphis, Tennessee, to target their older workforce nationwide !" Plaintiffs' Exhibit 2, p. 2. "No matter where my travels, in speaking with other FedEx employees, in states such as California, Georgia, Louisiana, Washington, Washington, D.C., New York, New Jersey, Tennessee, Texas, Nevada, Illinois, and within the state of Florida, they ALL displayed the same frustrations with the harassment tactics of management toward them and other senior employees." *Id.* He also filed a charge dated Sept. 1, 1997, EEOC # 15B97-133. Def. Motion to Dismiss, Morrison Dec., Ex. 8.

5. EEOC issued right to sue letters to Maccia and three others (Creamer, Clausnitzer and Krollman) on Aug. 2, 1999, and to Freeman on Sept. 15, 1999. *Id.* On October 26, 1999,

these five individuals and a sixth courier, Wayne Tate, all *pro se*, filed suit on their own behalf and "other similarly situated couriers", *Freeman et al. v. FedEx Corporation,* M.D. Fla., No. 99-CV-2466. Plaintiffs' Exhibit 3. Count XIII of the Complaint alleged a class action under 29 U.S.C. Section 216(b). Complaint pp. 57-59. The case was filed within 90 days of the receipt of notices of right to sue. Defendant's Motion to Dismiss, Morrison Declaration, Exs. 6, 8. The *Freeman* plaintiffs alleged that FedEx had engaged age discrimination against plaintiffs and other similarly situated older couriers at least since the adoption of the Best Practices Pays program, in violation of the ADEA and the Florida Civil Rights Act. Plaintiffs' Exhibit 3. FedEx moved to dismiss or strike the complaint on grounds that it was so verbose as to be difficult to respond to. Plaintiffs' Exhibit 4. FedEx noted that the complaint alleged a class action. Id

6. On January 27, 2000, the *Freeman* plaintiffs filed their motion to certify a nation-wide class action. Defendant's Motion, Morrison Dec., Exhibit 7, R. 18.[1] Defendants responded on February 14, 2000. *Id.*, R.31.

7. The *Freeman* suit was dismissed *without prejudice* and with leave to amend on Sept. 25, 2000, on the grounds that the Complaint was excessively verbose. At the same time, the motion for class certification was denied as moot. *Id.*, R.82. Plaintiffs Freeman, Maccia, Clausnitzer and Creamer appealed *pro se*. *Id.*

8. While the appeal was pending in the Eleventh Circuit, the district court extended plaintiffs' time to amend their

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[1] Defendant submitted the docket entries in the *Freeman* case as an attachment to the Morrison declaration and they are cited herein as R.___.

complaint, first to mid-February 2001, and thereafter to March 9, 2001. *Id,* R. 102 and 103. Plaintiffs, represented by the undersigned counsel, filed an amended complaint on March 6, 2001, with allegations of a nation wide pattern or practice of age discriminatory practices by FedEx Corporation. *Id.* R. 112. Twelve new potential plaintiffs were included in the amended complaint, including seven of the plaintiffs in this case, namely Donna Lewis, Kevin McQuillan, Charles Moncalieri, Andy Kubicki, Kenneth Mutchler, Phyllis Nelson and Elizabeth Tucker. *Id.*, R. 112. Plaintiffs also sought to dismiss their appeal voluntarily. On January 14, 2002, the Eleventh Circuit issued two orders in the *Freeman* appeal. The first order denied Plaintiffs-Appellants' motion to withdraw the appeal voluntarily. The second order affirmed the District Court's Order of September 25, 2000 dismissing the case. The Eleventh Circuit, following *Schuurman v. Motor Vessel "Betty K V"*, 798 F.2d 442, 445 (11th Cir.1986)(per curiam), held that by filing a notice of appeal, the *Freeman* plaintiffs had rendered the dismissal *without* prejudice final and appealable. A status conference was held in the District Court on March 25,2002, and on the motion of FedEx, the *Freeman* case was closed administratively on March 28, 2002. *Id.*, R. 129.

9. Plaintiff George Robertson worked for Federal Express Corporation until he was terminated on September 8, 2000. He filed a charge of age and disability discrimination against Federal Express Corporation on December 1, 2000. Apparently, EEOC issued a notice of right-to-sue letter to Robertson on April 25, 2001, which he did not receive until the next year, shortly after February 7, 2002. Plaintiffs' Exhibit 5, Robertson Declaration.

10. Plaintiff Patricia Kennedy has worked for FedEx as a courier in Florida since 1987. On December 3, 2001, she

contacted the EEOC in Tampa, answered the questions on a two page "Intake Questionaire," which she signed, and submitted a notarized five page affidavit. Plaintiffs' Exhibit 6. The questionnaire does not state that the form is not a charge, or that any additional steps are necessary to file a charge. *Id.* The form of the Affidavit states that the "Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open..." In the affidavit, Ms. Kennedy stated that during her first eight years at FedEx, she received favorable performance reviews and repeated bonus pay-outs, confirming her dedication to her customers and to her employer. Since the adoption of the Best Practices Pays Program, and the Minimum Acceptable Performance Standards in 1995, FedEx has "systematically targeted" her and others, "because of age", and that the practices were "continuing." Plaintiffs' Exhibit 6, Affidavit, p. 1. She submitted four additional pages of detailed allegations of systematic age discrimination against older couriers. *Id.* Affidavit, pp. 2-5. Ms. Kennedy concluded that "I know that I am not alone and many older couriers share my doubts and fears regarding being terminated or forced to retire...FedEx does not want us pre-1988 employees to continue to our employment lest they will have to pay for our retirement health benefits if we can complete 10 continuous years of service between 45 and 55." P. Ex. 1, Affidavit, p. 5. She asked EEOC to "force FedEx to end their age discrimination, so we can finish out our careers." *Id.* Her allegations were summarized in Charge No. 151A2011381, signed on May 30, 2002. Plaintiffs' Exhibit 7.

11. The Court received the complaint in this case on Monday, April 29, 2002 and it was signed for by D. Holmes. Plaintiffs' Exhibit 8.. The Complaint was marked "Filed" and entered on the Docket on April 30, 2002. *Id.*

ARGUMENT

Defendant has moved to dismiss the complaint as to twelve of the plaintiffs on the grounds that they failed to exhaust administrative remedies because they did not file charges with EEOC.[2] Defendant has also moved to dismiss the claims of the other two plaintiffs on the grounds that they filed suit more than 90 days after the EEOC issued notices of right to sue.[3]

A complaint states a claim upon which relief can be granted if it provides the defendant with "fair notice" of what plaintiff's claims are and the grounds on which they rest. *Conley v. Gibson,* 355 U.S. 41, 47 (1957); *Swierkiewicz v. Surena, N.A.,* ___ U.S.___, 122 S.Ct. 992, 998 (2002).

The charge-filing requirement in the ADEA, like the requirement in Title VII, is not jurisdictional. *Zipes v. Trans World Airlines,* 455 U.S. 385, 395 n.11 (1982). It is subject to equitable doctrines such as waiver, tolling and estoppel. *Morgan v. National Passenger Rail Road Corp.,* ___ U.S.___, 122 S.Ct. 2061, 2073, n.9 (2002) *citing Zipes,* 455 U.S. at 393. Furthermore, unlike Title VII, the ADEA does not require that a plaintiff obtain a right-to-sue letter before beginning litigation. 29 U.S.C. § 626(d). The ADEA only

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[2] These plaintiffs are Mr. Holowecki, Ms. Kennedy, Ms. Lewis, Mr. Moncalieri, Ms. Nelson, Mr. Kubicki, Ms. Tucker, Mr. Almendarez, Mr. Martinez, Ms. Martinez, Mr. Mutchler, and Ms. Nancy Trompics. Ms. Trompics, whose name was mis-spelled "Thompics"in the original complaint, was a courier for FedEx in Michigan until October 2001. Defendant is mistaken as to Ms. Kennedy, who has filed a charge. *See, supra, ¶ 10.*

[3] These two plaintiffs are McQuillen and Robertson.

requires that a charge be filed sixty (60) days before a suit is filed. The ADEA requires that upon receiving a charge, EEOC must promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion. *Id.* Accordingly, the purpose of the charge-filing requirements is to prevent surprise of defendants and allow EEOC an opportunity to conciliate claims. *Winbush v.State of Iowa,* 66 F.3d 1471, 1478 (8th Cir. 1995).

The ADEA authorizes employees to bring age discrimination actions "for and in behalf of... themselves and other employees similarly situated." 29 U.S.C. § 626(b); 29 U.S.C. § 216(b). In those provisions, "Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively." *Hoffman-La Roche, Inc. v. Sperling,* 493 U.S. 165, 170 (1989)

The 11 plaintiffs in this case who did not file charges can maintain this action. In collective actions under the ADEA, groups of plaintiffs have satisfied the statutory exhaustion of administrative remedies requirement based on a single valid charge filed by a similarly situated individual. *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990), *cert. denied* 499 U.S. 983 (1991). The single-filing rule is also followed in Title VII cases. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8 (1975). The rationale behind this single-filing rule, also known as piggy-backing, is that a single charge puts an employer on notice of potential litigation and it is futile to file multiple charges against an employer that is not willing to conciliate a single charge. *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, (7th Cir. 1988). FedEx has submitted no evidence that it has participated in conciliation efforts for any

of the age discrimination charges filed against it by older couriers.

Once the EEOC closed its investigations of the charges of the *Freeman* plaintiffs, the Complaint and Motion for Class Certification filed in the Middle District of Florida kept FedEx on notice of a potential class action. FedEx received and responded to the motion for class certification. Defendant's Motion to Dismiss, Morrison Dec, Ex. 7, R. 46. FedEx argues that everything filed in the *Freeman* case after September 25, 2000 is void because the case had been dismissed. However, both the parties and the District Court judge were mistaken about the status of the case until the Eleventh Circuit ruled that the September 25, 2002 dismissal had become final and appealable. In the interim, among other actions the District Court Judge had extended the time for filing an amended complaint. Regardless of the effect of the first and second amended complaints upon the *Freeman* litigation, for purposes of the present case they served as notice.

The two plaintiffs who were issued notices of right to sue but did not file suit within 90 days of the date of their notices also are entitled to maintain this action. The commencement of the *Freeman* putative class action suspended the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. *American Pipe & Const. Co. v. Utah,* 414 U.S. 538, 554 (1974); *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 354 (1983). When a party who has filed a charge with EEOC receives a notice of right-to-sue while a putative class action is pending, the 90 day period for filing suit does not run. *Crown, Cork,* 462 U.S. at 345. Filings by the *Freeman* plaintiffs support invocation of the single filing rule even though the original *Freeman* plaintiffs

are not parties to this case. *Tolliver*, 918 F.2d at 1057. In *Tolliver,* the Second Circuit held that under the ADEA the single filing rule is not limited to those electing to join pre-existing lawsuits. 918 F.2d at 1057. "The purpose of the charge filing requirement is fully served by an administrative claim that alerts EEOC to the nature and scope of the grievance, regardless of whether those with a similar grievance elect to join a pre-existing suit or initiate their own." *Id.*

Where grievances are alleged to arise throughout a large group, as in this case, the single filing rule applies if the charge includes 'some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim." 918 F.2d at 1057. It is not necessary to explicitly mention that a representative action is contemplated. *Anderson,* 852 F.2d at 1016. The questionnaires, affidavits, and charges filed by Mr. Freeman and other couriers beginning in 1996 put EEOC and FedEx explicitly alleged that FedEx had engaged in a nation-wide pattern of discrimination against older couriers. Plaintiffs' Exhibits 1, 2, and 6. Where specific allegations have been edited out of the charge by the EEOC, these documents serve as evidence of the scope of the issues upon which the charging parties exhausted remedies. *Wilkerson, v. Grinnell Corporation,* 270 F.3d 1314, 1318 (11th Cir. 2001); *BKB v. Maui Police Dept.*, 276 F.3d 191, 1102 (9th Cir. 2002). It was not Freeman and Maccia's responsible to provide notice to FedEx- it was EEOC's. 29 U.S.C. § 626(d). Moreover, any distinctions among a questionnaire, an affidavit, and a charge do not affect the statutory rights of the plaintiffs because the guiding principle for construing the charge-filing provisions of Title VII and the ADEA is that this is a "statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

The charge filed by Plaintiff Robertson also put Defendant on notice of his claim. Defendant asserts that Robertson was sent a right to sue letter more than 90 days before he filed this suit. However, he never received a copy of that letter; EEOC did not send it to his current address. Plaintiffs' Exhibit 5. When the date of receipt is challenged, there is a rebuttable presumption that the letter is received three days after it is mailed. *See Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 525 (2d Cir.1996). The presumption may be rebutted, "by admissible evidence, such as an affidavit by the claimant stating the actual date of receipt (or ... lack thereof)." *Peltier v. Apple Health Care*, 130 F. Supp.2d 285, 291 (D.Conn. 2000). Actual receipt of the right-to-sue rather than constructive receipt by the charging party commences the period. *Id.; Jones v. Madison Serv. Corp.*, 744 F.2d 1309, 1312 (7th Cir. 1984). Robertson's 90 day period of time for filing suit did not begin to run until approximately February 10, 2002, when he actually received notice of right-to-sue. This case was filed on April 29, 2002 less than 90 days later. Plaintiffs' Exhibit 8.

The questionnaire and affidavit submitted by Plaintiff Kennedy in December 3, 2001 are the equivalent of a charge. The ADEA requires that a timely complaint be filed with the EEOC. 29 U.S.C. § 626(d)(2). EEOC regulations define a charge filed under the ADEA as "a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act." 29 C.F.R. § 1626.3. Plaintiff Kennedy's questionnaire and affidavit fulfill those requirements.

Furthermore, the affidavit form states that the document would not be disclosed as long as the case "remains open"

from which a reasonable person could infer that a case was open when the affidavit was submitted. Plaintiffs' Exhibit 6.

Ms. Kennedy's questionnaire is sufficient to preserve Plaintiffs' right to sue on all systemic acts of age discrimination alleged therein, except that Plaintiffs terminated more than 300 days earlier could not use the questionnaire as a basis to challenge their terminations. In *Morgan,* the Supreme Court left open the question of whether a continuing violation can be raised based upon systemic discrimination. *Morgan v. National Passenger Rail Road Corp.*, ___U.S. ___, 122 S.Ct. 2061, 2073, n.9 (2002). The Second Circuit has held that allegations of a systemic violation invoke the continuing violations doctrine and toll the statute of limitations. *Gomes v. AVCO Corp.*, 964 F.2d 1330, 1333 (2d Cir.1992). Even if the questionnaire were, in some way, not the equivalent of a formal charge, those deficiencies would be cured by the relation back of the charge, filed on May 30, 2002. *Edelman v. Lynchburg College,* ___ U.S. ___, 122 S.Ct. 1145 (2002).

Finally, the formal charge plaintiff Kennedy submitted on May 30, 2002 preserves her rights, the rights of all other plaintiffs employed by FedEx within the previous 300 days, and the rights of all other Plaintiffs as to all job actions except terminations. A complainant need wait only 60 days from the time of notifying the EEOC before filing suit under the ADEA. 29 U.S.C. § 626(d); *Hodge v. New York College of Podiatric Medicine,* 157 F.3d 164, 168 (2d Cir. 1998). More than 60 days have now passed since the filing of the formal charge on May 30, 2002. No purpose would be served by dismissing this case, to be refiled based upon the May 30, 2002 charge. *Hodge*, 157 F.3d at 168. In that case, the Second Circuit held "because Hodge's federal ADEA suit would not have been time-barred had he chosen to refile or

reopen his never-acted-upon EEOC charge, it would make no sense to hold it time-bared where we have dispensed with the need to refile or reopen the charge. *Id.*

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's motion to dismiss the complaint.

Respectfully submitted,

David L. Rose (DLR 8716)
David M. Wachtel (DMW 1269)
Rose & Rose, P.C.
1320 19th Street NW 19th St., N.W.,
Suite 601
Washington, DC 20036
(202) 331-8555
(202) 331-0996 (fax)

Attorneys for the Plaintiffs

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Newark, NJ 07102
(212) 254-6996

Local Counsel for the Plaintiffs

UNITED STATES DISTRICT COURT
Southern District of New York

02-CV-3355 (LMM)

[Filed August 6, 2002]

Paul Holowecki, Patricia Kennedy,	)
Donna M. Lewis, Charles Moncalieri,	)
Phyllis Nelson, Andy Kubicki,	)
Elizabeth Tucker, Steven Almendarez,	)
Frank J. Martinez, Kelly L. Martinez,	)
Kevin McQuillan, Kenneth G. Mutchler,	)
George Robertson, and Nancy Trompics,	)
individually and on behalf of all others	)
similarly situated,	)
	)
Plaintiffs,	)
	)
v.	)
	)
Federal Express Corporation,	)
	)
Defendant.	)
	)

PLAINTIFFS' EXHIBITS SUBMITTED IN OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

1 EEOC Questionnaire and Affidavits of Gerald Freeman

2 EEOC Questionnaire and Affidavits of Vincent Maccia

3 Excerpts from Complaint in *Freeman et al. v. Federal Express Corporation*

4 Defendants' Motion to Dismiss Plaintiffs' Complaint or, in the Alternative, to Strike the Complaint *In Toto* in *Freeman et al. v. Federal Express Corporation*

5 Declaration of George Robertson

6 EEOC Questionnaire and Affidavits of Patricia Kennedy

7 EEOC Charge of Patricia Kennedy and Transmittal Letter

8 Record of Delivery of Complaint in Instant Case

EEOC USE ONLY

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

Name (Intake Officer)

Please answer the following questions, telling us briefly why you have been discriminated against in employment. An officer of the EEOC will talk with you after you complete this form.
Birth:[REDACTED],1960
(Please print) SSN: [REDACTED]4266

NAME: Gerald D. Freeman
(First) (Middle Name or Initial) (Last)

Date: 06-05-1996

ADDRESS: 2700 Bayshore Blvd. #5105
Phone No. (include area code): (813) 733-2053
CITY: Dunedin STATE FL ZIP CODE 34698

Please provide the name of an individual at a different address who is in the local area and who would know how to reach you.

NAME: Elizabeth Wood RELATIONSHIP: Friend
TELEPHONE (813) 736-0065

ADDRESS: 950 Broadway CITY: Dunedin
STATE FL ZIP CODE 34698

Why do you believe this action was taken against you? (e.g., Race, Color, Religion, Sex, Age, Disability, or National Origin.)
The Discrimination based upon the Company's belief they can become more cost effective with a younger work force.

What action was taken against you that you believe to be discrimination? What harm, if any, was caused to you or others in your work situation as a result of that action? (e.g., Discharge, Discipline, or Harassment) (if more space is required, use reverse.)

Federal Express by Instituting a "New" check-riding procedure and other "New" methods and Policies under the guise of their *Best Practices Pays* Program has, in effect, abandoned many of the principals under which we were first employed. One such principal/*guarantee* has been reinforced annually via Survey-Feedback Action (S.F.A.) question # (see other side)

I believe I was discriminated against by: (Check those that apply)

☒ EMPLOYER

NAME: FEDERAL EXPRESS CORPORATION
ADDRESS: 1881 MAIN STREET
DUNEDIN, FL
PHONE: (813) 736-6727

Approximate number employed by this employer: NINETY

What was the most recent date the harm you alleged took place? APRIL 22, 1996

Are you now employed by the employer that you believe discriminated against you?

YES:
FROM: 7-27-82
(Date)

CURRENT POSITION:
Courier $14.49/HR.

Finally, your identity will be disclosed to the organization which allegedly dismiminated against you.

You ☒ Consent or ☐ not consent to such disclosure?

Have you sought assistance about the action you think was discriminatory from any Government agency, from your union, an attorney, or from any other source?

☒ YES if answer is yes; complete below.)

THE OF SOURCE OF ASSISTANCE: INTERNAL GFTP
DATE: APRIL 26,1996

RESULTS, IF ANY: WENT THROUGH STEP 1 PROCEDURE AND LOST DUE TO MANAGEMENT'S DECISION TO OVERLOOK ANY ASPECT OF DISCRIMINATORY MOTIVES; DECLINED STEP 2 FOR OBVIOUS REASONS. SEE, EXHIBIT "A", IN AFFIDAVIT, ATTACHED.

Have you filed an EEOC charge in the past? ☒ NO

☒ DATE FILED:
SIGNATURE /s/Gerald D. Freeman

DATE June 6, 1996

EEOC Form 283

"CAN BE SURE OF A JOB IF I DO GOOD WORK"

Implicit in this statement is a promise that if I do a good job...I will always have a job. Now, after back-to-back record "after-tax" profit years, Federal Express wants to take it all back and say that those performance reviews you received (in those years and earlier) were gifts by laxidaisical management teams which were misguided into "giving" superior on-road performance ratings (i.e. 7.0, the highest) when they should have been giving out the minimum level of accepted performance, 4.0 or lower (i.e. the NEW standard raised the productivity *goals* in both cycles — thus an person could be performing under the minimum level, 3.9 or lower). And so, one day we were getting bonus pay for "X" amount of stops per hour and the following day, that same amount of work was insufficient for job retention!

Accordingly, I believe the "NEW" check-ride procedure was designed to promote discrimination by management against older employees. There is a greater frequency of check-rides to older employees, without reasonable cause (i.e. drop in performance; sufficient change in customer base; sufficient change in route boundaries; traffic; just in time for your performance review; etc.) when younger employees are taking to the road without as much training as in the past and thus their techniques or lack thereof would suggest that they should be the ones having a greater frequency of check-rides. Management has a sufficient data base to determine how many stops you have run and are capable of running over a long period of time. They know your maximum capabilities, then they ceremoniously go through the motions of a "more thorough and object formula for arriving at your *NEW GOALS*, which are *HIGHER* than your previous 13 week average. Thus, in order to save your job, you must some how beat your average every week or face the axe. What is the

immediate harm from such action, as previously stated, that productivity level that once was good enough to warrant bonus or PRO-PAY (which management has used to compare with U.P.S. annual raise, citing superiority when pro-pay included just as if it was a raise, some $1,500.00 plus annually) is not good enough to keep your job! And of course, all the while you are not making *their* goals (or making them, it doesn't seem to matter) management is harassing you with performance reminders and more check-rides. My last check-ride (April 3, 1996) had all the earmarks of harassment (provocation to make an outburst which would have lead to a suspension). The threat of an EEOC complaint has slowed the check-rides, however, my manager has suggested one is imminent on several occasions inferring it was my idea. Recently, management has designed a new form of harassment, one with a familar pattern of entrapment — a planned outburst. It was the old *good cop/bad cop* routine played out in the form of management first wanting to change my sort assignment only, then moving back my start time in order to cut my hours by 2.5 hours per week (See Affidavit, Exhibit "A" for GFT internal action taken). Instead of getting heated up by the frustration of it all, I chose to de more than threaten an EEOC compliant. But management has other "performance reminders" flooding your emloyee file where the training/re-training for such "NEW" Best Practice Pays Methods *is* another performance reminder. And if they can't get you fired for a "planned outburst", then they will still have your declining on-road performance (via "NEW" check-ride procedure) and *other* performance reminders to cumulatively say, *you are a poorly performing courier that should be terminated.*

PRIVACY ACT STATEMENT

(This form is covered by the Privacy Act of 1974; Public Law 93-579. Authority for requesting the personal data and the uses thereof are given below.)

1. *FORM NUMBER/TITLE/DATE. EEOC FORM 283, Intake Questionnaire, August 1987.*

2. *AUTHORITY. 42 U.S.C. § 2000e-5b, 29 U.S.C. §211, 29 U.S.C. §626.*

3. *PRINICIPAL PURPOSE. The purpose of this questionnaire is to solicit information to enable the Commission to avoid the intake of matters not within its jurisdiction.*

4. *ROUTINE USES. Information provided on this form will be used by Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over potential charges, complaints or allegations of employment discrimination and to provide such pre-charge filing counseling as is appropriate. Information provided on this form may be disclosed to other State, local and federal agencies as may be appropriate or necessary to carrying out the Commission's functions. This would include employment practices laws. Information may also be disclosed to charging parties in consideration of or in connection with litigation.*

5. *WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION. The providing of this information is voluntary but the failure to do so may*

hamper the Commission's investigation of a charge of discrimination. It is not mandatory that this form be used to provide the requested information.

STATE OF_____ CASE NAME_____
COUNTY OF _____ CASE NUMBER_____

AFFIDAVIT

I, GERALD D. FREEMAN , being first duly sworn upon my oath affirm and hereby say: I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 45 years of age, my gender is male , and my racial identity is Caucasian .

My date of birth was [REDACTED], 1950 . My Social Security number is [REDACTED]-4255 .

I reside at 2700 Bayshore Blvd. Unit 5106 . City of Dunedin , County of Pinellas , State of Florida , Zip Code 34698 .

My telephone number is (including area code) (813) 733-2053 .

My complaint is against Federal Express Corporation , which is located at 1881 Main Street , in Dunedin Florida 34698 . Its telephone number is (including area code) (813) 736-6727 . My job classification is (if applicable) Courier . My wage is $14.49 per hour . My immediate supervisor is (if applicable) Louis J. Fusco - Manager Operations .

For the past 16 months or more, Federal Express management, principally in Dunedin and Orlando (District Office), has singled out myself, and others so situated, for the express purpose of "building a profile" of an employee who performs poorly and should either be terminated and/or harassed into *voluntary retirement*. Through the institution of "new check-ride procedures" based upon "Best Practice Pay Methods" management has sought to not only raise our stops/hour productivity work load in both of our cycles, but more importantly, they have *re-classified and demoted* that level of performance which was previously considered **above average to excellent** to *the minimum level of performance acceptable for job retention.*

Thus, if you are already performing at a 100% plus level (and to achieve pre-"new" check-ride performance higher ratings, it took some kind of dedication-contrary to current management's belief) and THEN they implement an even higher quota as a MINIMUM ACCEPTABLE level of performance; ***your future employment is in jeopardy as you are a couple performance reminders*** (informing you your below the minimum level of performance and what action do you plan to bring up your current sub-standard output) ***and a judgment day*** (the third and final request to raise your performance — your to specify how and when you will achieve your agreed-to level of performance) ***away from termination or retirement.***

And all the time management is building a file of poor performance in methods and paperwork with the same "performance reminder" about mistakes being made where "no training" or "retraining" or knowledge is made available during work hours as to the *"new 'right' acceptable methods"*. We are also receiving "performance reminders" for our electronic scans not being in compliance (alleged

missed scans) even though its common knowledge that the system and the equipment are not even close to being 100% accurate and to make matters worse, the person in charge of equipment repair (Leap Candidate for Management position as well as a courier who has very few courier duties due to his unique job — station team leader) is the SAME PERSON HANDING OUT *THE PERFORMANCE REMINDERS.* And although he and management claims such "performance reminders" are not going to be used for disciplinary purposes rather for locating and solving "root" problems, clearly, the purely system problems as well as the other ones are still being directed at and blame attached to the individual and with the finger pointing squarely at us, we are being asked what we can do about it (and when we suggested how we could track system error from courier error, our station manager said we would merely cheat by inflating our scan count—just as if we could guess how many scans the computer system will drop each day/most of the time it would be zero, thus her logic, although clearly negative, would have us out of compliance more often than we are now if we would attempt such a ridiculous thing—but her statement, more importantly, demonstrates management's desire to continue to place blame on us—so they can build their case of poor performance. And when it comes to review time, you can bet the farm those "performance reminders" will re-surface as ammunition for getting a poor score in such appropriate categories; and all those "root" causes will be forgotten/not assessed as the only thing you will see will be numbers!

Additionally, our mandatory Annual Courier Job Knowledge Test which was not previously included in your review except as pass/fail and which allowed you to study TWO hours prior to testing and then TWO hours after the test so you could review those areas where you missed some questions (pre-subscription training), **NOW**, the "NEW"

Courier Job Knowledge Test is counted on your review and is given twice a year...but with ONLY one hour of study before the test and ZERO hours of pre-subscription training (can't discuss test questions with other couriers or face termination)—so you can continue to miss the same questions over and over again and if you fail the test and don't succeed on the second test—you're out of your courier position, effectively, you've been terminated.

Furthermore, management has continually harassed me over the past 70 weeks with 10 needless check-rides (and when one considers I was not available to be check-rode for over 32 of those weeks: left and right knee surgeries and rehabs, six weeks on a different route [no check-ride there], vacations and other days off). Ten check-rides in approximately 38 weeks can not be justified, the route didn't substantially change and even my supervisor admits my numbers over that period are very consistent. So what was the real reason even beyond harassment for the last five (since January,1996), management has tried every which way to get me to sign a form ***accepting*** my higher productivity goals *while acknowledging them as a minimum acceptable level of performance for job retention.* After the April 3, 1996 check-ride, my manager went so far as to ask that I just sign the piece of paper that such "goals" were depicted...just to acknowledge we had this discussion, I respectfully declined, stating that wasn't the Federal Express procedure for acknowledging a couriers refusal to sign anything—I went to the open door of the supervisor next door and requested he sign the back of my timecard noting such a meeting took place—he said fine and he did it! It doesn't take a genius to figure out what deceptive practices management was attempting to perfect. I don't believe I'm a paranoid person!

My manager on several occasions has stated, "I would not set you up to fail". However, all of his and other management actions would demonstrate an entirely different conclusion. As previously stated, this is not the first time I have considered filing and/or discussing my concerns, March 7-8,1996 and April 8,1996, respectfully, and I am in the process of typing up those notes upon the completion of this complaint (will keep original hand written notes). My reason for not following through with such concerns was the climate around the station made me fear for my job; so I thought it better to continue to observe, hope Mr. Jasper Crawford's investigation could spell us some relief and with my apparent threat of going to the EEOC, that management would step back from their confrontations. But I was wrong.

Are all of the things just described being applied evenly to younger employees—absolutely not! But even if it may appear on the surface that such is the case (i.e. they get check-rides-not as often; they get performance reminders-but no big deal is made from them; they even make a lot of mistakes a seasoned courier wouldn't make and management just looks the other way citing their inexperience), management has the option to bear down on the older employees and it does (i.e. electronic scan compliance; international air bill audits; etc.) And as to the ***purely objective*** "New Check-Ride Procedures" (i.e. from the Feb. 29, 1996 check-ride, I received a "performance reminder" for March 1,1996 of substandard work as "WE" had agree to (didn't happen)—***it first had a stop/hour rate for mix cycle of 9.8, then whited out it was raised to 10.0,*** then the following week I received another performance reminder with 9.8 stops/hour—then after my April 3,1996 check-ride, Lou said he was lowering my mixed cycle to 9.8 to reflect my concern I would be just working against my own numbers—so much for non-subjective judging system to arrive at your goals),

management sells it strong, but doesn't practice it except against senior couriers, otherwise much of our younger employees wouldn't still be around as they have been known to take out 10 stops and make a day of it!

Now, in this last month, management has once again decided to step up their harassment/discriminatory practices against me by displacing me from my early morning start time notwithstanding their partial acknowledgment that such action was contrary to their own policies and procedures. It was that action that precipitated this complaint process (See, full account of Federal Express internal action taken [GFTP] and the subsequent result, Exhibit "A"). Since March 3,1996, I have threatened to file this complaint and went so far as to enter Federal Express' pre-EEOC Discussions regarding management conduct (i.e. March 7th and April 8th). My discussions with Mr. Jasper Crawford relating to an ex-Federal Express employee in late February caused me to take a much harder look at what was happening (currently). It should be noted it was my reflection of what I said and not anything Mr. Crawford said, which caused me to reflect upon my present situation—to take everything more serious because of the atmosphere at the workplace. I just had TWO check-rides by two different supervisors from two different stations and they were meant to be intimidating, but the follow-up meeting did not take place like previously held check-rides *by management in your own station.* I started taking notes after discussions with management and being a lot more guarded in my conversations with them as they were gunning for people to step out of line so they could suspend them. And then came the annual Survey Feedback Action for 1996. To demonstrate how innocent/open and fair management is, our company has the SFA so management can improve their skills, and of course, it is **strictly confidential and voluntary**. However, it is currently neither of those two things; quite possibly, it

never was! I did not participate in either taking the survey or in the feedback process. I felt the program severely lacked integrity (the computer log-in time along with the manual time card entry would be link enough to *I.D.* your answers and even if you just logged in and decided not to respond to any questions, they could know that too...additionally, the pre-statistical general data: male/female; years of service; etc. would further narrow and define the owner of such responses-but like they say, those questions are optional too, however; no response there could also have a narrowing affect). This years' SFA started out much different than past years, people seemed indifferent and pretty apathetic as our station approached the final week before it must be completed (even management, beyond the daily reminders for everyone to complete it commented on the small number of participants—less than 50%. Then management began a little arm-twisting campaign to increase the turn-out. If this system was confidential and voluntary, how did management know who to approach—**business picked up**. It surprised me how many didn't take it! One such individual who resisted the arm-twisting campaign *even after being singled out,* was questioned by the Senior Manager about why she did not want to take it. And she was later asked (ops manager) if *anyone tried to influence her into not taking the SFA?* Without saying my name, management was pointing a finger right at me; the courier told that manager it was her own decision not to take it. I didn't try to influence anyone, although I probably could have converted a few. I did discuss the virtues of gaining a greater influence by a subtle form of "civil disobedience"; in other words, by not taking a purely voluntary survey of management's performance, no response might peak more interest and movement by UPPER management to investigate...whereas, if most take it and even if most scored management poorly, the fact most took it would signal a believe that the message will be heard and action taken-

business the same as usual! I spoke these words to the courier in charge of the administering the Survey; the walls have eyes and ears (i.e. cameras and sound recording...according to some) even if he didn't pass the message on to our Senior Manager. So was I the object of the witch-hunt being conducted? Management sure has great respect for strictly confidential and voluntary.

Management has been fairly clever in disguising its master plan "to set us up to fail" (senior couriers) so we will either quit/retire out of disgust or work under the stress and possibly go too fast— make a big enough mistake so they can terminate our employment by allowing them to build our file to the point where our credibility is zero...so we are on the outside looking in, like the ex-Federal Express employee Mr. Jasper Crawford is trying to help. I know I'm still an excellent employee for Federal Express and regardless of what the "NEW" numbers say I know I'm not a minimum performing courier, notwithstanding my two knee surgeries last year. I do not believe management would treat me or any other senior courier differently as far as their master plan is concerned. It's been my observation, how they go after the individual and in what priority they seek that individual, depends upon that person's particular circumstances and their opportunistic ways (i.e. after my 1st knee injury...I noticed a different attitude in how management treated me).

I have read and had an opportunity to correct this Affidavit and Exhibit "A" that together consist of ____ handwritten [ ] typed [ ] pages and swear that these facts are true and correct to the best of my knowledge and belief.

_____

Before me, the undersigned authority, personally appeared _____, who being duly sworn, says under oath that the matters and facts set out in the above document, consisting of _____ pages, true and correct to the best ofhis/her belief.

Sworn to before me, this ____day of _____, 199__, who has produced _____as identification.

My Commission expires: _____

(Notary Public)

Exhibit "A", part I

GUARANTEED FAIR TREATMENT

RE: AGE DISCRIMINATION IN THE WORK PLACE

For the record I'd like to state I've always been flexible when it came to fulfilling the operational needs on the a.m. sort (i.e. from a very early start time, 0500a.m., in order to go the ramp for over-flow boxes and documents to sorting documents for call in sick to loading several trucks from the belt for routes not adjacent to my current route.) The A.M. Sort has always been explained as a seniority status position regarding early start times and assignments.

In fact on Thursday, April 18, 1996, I received a message from the CLW station (rt 196) requesting I call them ASAP (msg received approx. 12:45 P.M.) regarding the new sort assignments and my status as the most senior employee involved in the particular section of the sort they (management) was working on at that time. And, within five minutes I stopped my mixed cycle (not knowing the subject matter of such urgent matters) and called the station asking to speak to Andy or Lou (ops mgrs) per the message on the Dads screen. Ardy answered the telephone thanking me for responding so quickly and stating management's urgent need to know what my feelings were regarding the sort assignments they were reorganizing. My current box sip scan position was being taken over by a causal employee moving down from off-loading the cans on top and they were offering me, due to my seniority status – per Ardy's words, a 0705 A.M. start time slot sorting the documents from my area or I could choose to start at 0735 A.M. doing my own truck. I told Ardy I would prefer to start at 0705 A.M. and do the envelope sort; he again thanked me for my promptness and

said next weeks schedule would reflect my new work assignment at the 0705 A.M. start time. It should be noted that the previous day, April 17th, as well as that day, Thursday the 18th and Friday, the 19th, my start time had been changed by Terry Galloway, our senior manager, to exclude me from the sort by crossing through my 0705 A.M. start time and writing 0735 A.M. above it, but I was told that was a mistake.

When I returned to the building that Thursday afternoon (after Ardy's call), I looked at next weeks schedule to see if it reflected my new 0705 A.M. sort assignment and it was so posted for all of that week. The following day, upon returning to the building, I again looked up at the schedule to see what the new sort number designation translated to mean regarding my new assignment. And now to my amazement this *"new"* schedule had me off the 0705 A.M. sort and starting at 0735 A.M. every day of the new week (April 22-April 26). I was upset as to the result as well as the handling of the change (urgent message please respond ASAP). I approached Lou Fusco, my Manager, to find out how and why all the games and nonsense. He claimed he didn't understand what was going on but he would find out–they were all in the conference room again trying to work out the A.M. sort. When I appeared at the door both Terry and Lou chimmed in: "If I don't hear from Lou before Monday, come in at 0735 A.M. per the new schedule." Sometime Saturday afternoon, while I was away from my house, Lou did call and said I was suppose to report Monday for the 0705 A.M. sort.

On Monday before the 0705 A.M. sort started, I went over to the schedule and noticed my start time for the week was 0705 A.M. But when I returned to the building after I had completed my route, the *newly revised* schedule now showed my same Monday 0705 A.M. start time, however, the

remainder of the week again reflected the 0735 A.M. start time. Once again I set out to find my manager to discuss this latest charade. I found him with Ardy in our meeting room and he again stated he didn't understand what his boss was doing and with my seniority, I have a right to be upset. He asked me if I could please come in as scheduled (0735 A.M.) tomorrow, April 23rd and he would again find out what is going on – I didn't have any choice, so I said I would.

Later that evening I decided to go ahead and show up at 0705 to see if all the teacher's pets got their usual 0705 A.M. start for the slowest day of the week (P.M. over-time champions, Ron Margolis and Larry Horton). It's Tuesday morning, and *guess what,* no surprises here: they're both there waiting to start at 0705 A.M. – of course, all of their time will be for time and a half in the morning, as they have their full time routes to run later. *Best Practice Pays* if your're young and they like you! Ardy observed me sitting there and asked me to start at 0705 A.M. – he said three people called in sick. I suppose that would account for Ron and Larry being *johnny on the spot*, real lucky they were just hanging around 4 hours before their full shift on the slowest day of the week. When I went back to the documents sort area after the weekly A.M. Meeting, stretch-n-flex and vehicle pre-check, I noticed 6 casual topside off loading boxes (real cost effective there) and no one really seemed to know where I was to fill in . . . then I saw table four full of docs and no-one there to scan them, so I jumped right in there, just where I was going to go had the original ASAP call plan had been carried out.

So where does this scenario lead us:

1. I'm more senior than our groups' present document sorter by 45,000 employee numbers and its her spot they

asked me to stand in for when she calls in sick, which has always been excessive, but who counts;

2. As to the casual employees moving down from their traditional box off-loading positions, these quasi-employees were hired to cargo handle because regular couriers didn't want to do that job and they they try to go out and meet their customers with offensive body oder. They were also hired for peak season to deliver bulk stops, etc. in order to make the best possible service commitment for the holidays. But now after peak, management comes to us and ask us to recommend people for them to interview and hire for what? Cost can't be the issue, there are so many of them falling over each other, all the while our inbound and outbound package counts continue to decrease as more and more snowbirds (six month) residents go northward each day. Can these casuals even scan the documents as effectively as us *older employees*? They can scan the bar code as well as anyone, however, then putting them in the proper basket . . . even if the shipper had a bad zip code or used a P.O. Box zip code. I know they can't do it as well. But this is not about qualifications, cost or even seniority. This is about trying to push older couriers a step closer to the door by pinching their wallets (2 ½ hours a week) and adding stress beyond the new productivity goals, etc. These younger casual employee are not going to stay with Federal Express for 5-7 hours a week in a non-status position. These non-status employees will not have the patience to wait for us older employees to decide to retire several years down the road. But management doesn't want to wait either! And by their words and actions, they have made it very clear . . . they intend to dictate to us when and how we will step down!

3. And finally, our *"over-time champions"*, like the over-abundant casual help, demonstrate that *cost isn't the issue* and

likewise, neither is seniority – except as to the negative implications of such seniority. Was Wednesday, April 24th or Thursday, April 25th any different for the *"over-time champions"*, no, they started before the 0735 full timers even though they would be making time and a half for every minute they worked on the sort. The use of these individuals conclusively demonstrates that management will pay more in the short term in order to keep up the stress on its older employees, keep them moving a step closer to the door.

It is strange how a *people company* could engage in such activity knowing that such pressure will shorten careers, but it will also lead to increased accidents and injuries to these same individuals that made Federal Express what it is today.

Respectfully,

Gerald D. Freeman
FedEx EE# 22703

cc: Senior Manager Terry Galloway
Operations Manager Lou Fusco
Jasper Crawford, EEOC

Exhibit "A", part II

GERALD D. FREEMAN
FEDEX EE #22703
2700 Bayshore Blvd. #5106
Dunedin, FL 34698
(813) 733-2053

May 13, 1996

Mr. Marco Chan
FDX/Sunshine Dist. Office
450 East South Street ste 300
Orlando, FL 32801
(407) 246-6700

Dear Mr. Chan:

With regard to your overnight letter of May 9, 1996, I must respectfully decline to fill out and engage in Federal Express' very own GFT/EEOC process. I realize how desireable it would be damage control purposes to be able to guarantee containment of such a growing and violatile issue. As you already know via your copy, I have already respectfully declined this same offer via another overnight letter from my immediate supervisor, Lou Fusco, dated April 30, 1996; sent to my home while I was out-of-town on vacation. And before that on April 8, 1996, I also respectfully declined this same assistance regarding the harassing check-ride policy you instituted in order to get us to sign off on productivity rates which once were considered superior but now due to "THE CHANGE IN POLICY", the same productivity rates are considered the minimum performance allowable for the *job retention*. I really believe any individual should not have to decline anything for a *third*

time, as such conduct should in-an-of-itself constitute harrassment!

However, because you brought this up and maybe someone further down the road might not be able to "SEE" reality for what it's worth, I'll try to briefly explain my reasons for the loss of confidence in the entitled heading of the document (i.e. GFTP/EEO) to wit you command me to fill out and return to you by May 14, 1996 (I did read the section titled, "Your Responsibilities", in the packet – but I desire a more independent and thorough examination of the charges):

1. Guarantee fair Treatment (i.e. GFT part of EEO pamphlet) does not stand for the same thing it once did:

I was on a GFT panel many years ago regarding a courier at CLW, who only knew because his mother-in-law and my wife were friends and she knew me to be a fair and honest person – by the way, I was working at the TPF station at the time. That proceeding almost ended without formal vote because the evidence was so overwhelming against management's contention that this courier was extorting food for special treatment (i.e. earliest possible Saturday delivery, paychecks enclosed); however, the chairperson expressed his confidence (orally) that all panel members – including two Senior Managers from South California and New Mexico, *would vote responsibly* according to the evidence received that day . . . it was a unanimous decision against management's decision to terminate this employee!

2. Years later this same employee is again terminated under the leadership of a person who openly vowed to get him for his reversal of management's decision. The circumstantial evidence was again about the same "quality" as in the first GFT proceeding, however, this time there was no reviewing panel of his peers (3 members) and two members of management. And at his unemployment hearing (which was recorded) CLW management, the company's attorney, as well as Memphis, demonstrated their true colors by telling an Administrative Hearing Office under oath that the reason why this person was terminated (where other couriers were not, even though, they admitted to similar, but more aggrievous conduct) – was because he had a ***"Life-Time Warning Letter"*** in his file from the GFT proceeding he had won due to the ***make-up*** of his reviewing panel: three couriers voted for him – two management members voted in favor of the ***evidence***!

3. The ***"Guaranteed Fair Treatment"*** *process was violated several times by that one act:*

A. Procedurally speaking, the outcome of an empaneled review, the vote, ***should have never been disclosed***, per the governing rules of such Federal Express GFT process;

B. The *"concept"* of retaliation for winning a GFT ***on a secret ballot***, notwithstanding the LIE about the actual outcome, is also contrary to the GFT's ***stated purpose*** and ***confidence*** in the process;

C. There is no such thing as a ***"Lifetime Warning Letter"***; Federal Express' attorney (at the

proceeding), CLW management and the personnel representative at the hearing ***knew*** this was an perjured statement, as did the terminated individual who was not permitted legal counsel at the hearing, otherwise, his then 2nd GFT case would have been automatically terminated by the appearance of counsel – what a clever twist/rule to have for ***"Guaranteed Fair Treatment"***: The Company can have legal counsel – the employee can't ...I wonder what our founding fathers would have said about the GFT Rule; and

D. In the final stage of this individual's second and final GFT Step Process, I was interviewed by telephone (via top Memphis Personnel, alleged assistant to the Director) due to a statement management asked me to make during the early investigation into this person's termination proceeding. I told this individual that my statement was correct to the best of my knowledge (i.e. that I had heard other couriers had a ***habit*** of doing what that person was terminated for and *yes*, these words were expressed to me long before this ever became an issued), however, I was very disturbed about he perjury Federal Express committed at a legal proceeding and I told her how I had personal knowledge of how and why it was perjured testimony. She said they heard the tape recording of the proceeding and whereas that conduct was deplorable, I did not know all the facts in the case and therefore, I could have no know way of knowing whether he was guilty of doing the acts charged. I asked her is she really believed ***the end justifies the means***. I also asked her how she could have any confidence in management's case if they would make up such a

desperate lie. She again assured me I didn't know all the facts!

Well, Mr. Chan, I'll tell you what facts I am aware of: Federal Express ***does not*** play by the rules and hasn't for a long time - it's too costly... which really brings us back full circle to where I am today with my on-going problem. Senior couriers are too costly, thus management's push to harass and discriminate regardless of the rules or our contribution throughout the years. I know what your thinking, If you feel that way about the GFT process and Federal Express, why don't I leave! That concept has been verbalized many times by our current Senior Manager! It would certainly make your task easier if all of us would take the "easy road" and leave on good terms, before Federal Express builds its case (our personnel file) against us as poor working habits/poor attitude, ***"typical of older employees"*** ... I remember hearing that a few years ago, saying it would never happen to me. Well, with my eyes now ***wide open***, I can now see it really didn't happen to them - back then, management just painted the picture and the younger employees believed - in the image painted. "Federal Express is one of the TEN BEST Companies to work for in the U.S." and with Guaranteed Fair Treatment" and their own EEOC department to ***ensure*** Federal Express remains a ***PEOPLE*** Company, who could ask for anything more!

Respectfully,

Gerald D. Freeman

Exhibit "A", part III

Marco Chan
Managing Director
Sunshine District

Federal Express Corporation
450 East South Street
Suite 300
Orlando, FL 32801
Telephone 407-246-6700
Fax 407-425-1470

FedEx
Federal Express

VIA FEDEX OVERNIGHT LETTER/ Received 5-17-96 at CLW Station GDJ

May 16, 1996

Mr. Gerald Freeman
2700 Bayshore #5106
Dunedin, FL 34698

Dear Gerald:

On Wednesday, May 15, 1996, a Step I GFTP conference call was conducted. You and I were on the call as well as Terri Galloway, CLW Senior Manger, Lou Fusco, CLW Operations Manger, and Mike Goodling, Sunshine District Senior Personnel Representative.

Before I respond to your Step I GFTP, I would like to address the issue of your allegation of age discrimination. Since you have been given ample opportunity to expound on your allegation, and you have repeatedly refused to supply any information for us to investigate the matter, and you advised

me on May 15 that you declined to utilize the internal EEO process, I am setting that issue aside.

During our Step I conference call, you stated that your main concern is that management changed your scheduled start time from 0705 to 0735 for week beginning April 22, 1996. You felt that decision was unfair, especially when your management asked you for your preference of a start time on April 18, 1996.

I did confirm with Operations Manger, Ardie Piazza, that he did ask you what your preference was; however, when CLW management finished preparing the schedule, your preference could not be accommodated. Therefore, the change of your scheduled start time from 0705 to 0735 was made. At no time, however, did Manager, Ardie Piazza, commit that your preference would be your actual scheduled start time.

You also stated that you feel that your company continuous service should allow you the earlier start time. According to the Personnel Guidelines for U.S. Ground Operations, "work assignments are the prerogative and responsibility of management and should be changed when necessary to most effectively meet operational needs. Work assignments include hours and days of work assigned, and specific duties." Therefore, I am upholding your management's decision to change your work assignment.

If you still feel that you have been treated unfairly, you may proceed to Step II of the Guaranteed Fair Treatment Procedure. To do so, you must submit a written synopsis of your complaint within seven (7) calendar days to Scott Bunker, Vice President, Southern Region, 1790 Kirby Parkway, Suite 500, Memphis, TN 38138 (COMAT: 38194/MEM/TN/3011). Scott Bunker will forward a copy of

your Step II complaint to Mary Alice Taylor. You will receive a joint response from Scott Bunker and Mary Alice Taylor. You should also submit a copy of our Step II complaint to Sunshine District Senior Personnel Representative, Mike Goodling, at 32801/ORLHQ/FL.

If you should need assistance in this regard, please feel free to contact Mike Goodling at 1-800-321-6528.

Regards,

/s/
Marco Chan
Managing Director
Sunshine District

dal

cc: Mary Alice Taylor
Scott Bunker
Terri Galloway
Lou Fusco
Mike Goodling

Exhibit "A", part IV

GERALD D. FREEMAN
FEDEX # 22703
2700 BAYSHORE BLD. #5106
DUNEDIN, FL 34698
(813) 733-2053

Mr. Scott Bunker
Federal Express Corporation
Vice President Southern Region
1790 Kirby Parkway Suite 500
Memphis, TN 38138

May 22, 1996

Dear Mr. Bunker

Please be advised I see no reason to pursue the Step II GFTP. I do not consider it to be a viable course of action as the selectivity of issues/non-issues can and does effectively diminish and/or dissipate the very reason for the filing of such a grievance and due to the inherent conflict of interest derived from one investigating and then judging oneself. Although my confidence in the GFT process was not very high (See copy of attached letter sent to Mr. Marco Chan, dated May 13, 1996), I felt like I should at least give Federal Express a chance to right itself. However, Mr. Chan's letter of May 16, 1996 to wit you were copied evidenced the exact reason why I chose not to participate in an internal EEOC-type of investigation whereby there would be *no appeal* from it's findings.

I realize Mr. Chan's anger toward me for not allowing him to contain and discredit my allegations of discrimination

within his district should have been expected. However, I am certain his characterization of what did or did not occur would have been just as one-sided as were the conclusions he managed to discover once I was prematurely ejected from the Step I GFTP conference call. Being allowed to participate in the investigative portion of the conference call whereby Ms. Galloway actually said something besides "Present", might have forced the "*seniority issue*" (i.e. went you bid on a new route the start time and sort function is often a significant reason for your selection) as well as "*the motivation issue*". But that was not to be. However, given the disposition of the "facts" to this case, I'd like to set the record straight so that if upper management should choose to rely upon them, they would do so to their detriment:

1. I did not refuse "repeatedly" or otherwise to supply Mr. Chan's office with the information necessary for him to investigate the *motive* behind the discriminatory actions taken against me. As I so stated in the conference call, all the information I had regarding this particular matter (i.e. dates, times and what was said by whom - to whom) he already has possession of and if he choose to ignore same, there was nothing I could do about it. Mr. Chan's line of questioning was as if he could not read the English language; however his intent was "to declare" what my main concern was or wasn't instead of dealing with the specific facts I outlined.

2. It seems absurd to me that Mr. Chan could infer that neither Ardy Piazza or for that matter CLW management *did not commit* to my preference to which **they solicited** based upon **their notion of propriety**. Mer. Chan overlooked one, my

conversation on the 18th of April where Mr. Piazza told me the schedule would reflect my new sort assignment starting the week of April 22nd; two, the schedule posted the next morning confirming the discussion of April 18th; three, my confronting both Ardy Piazza and Lou Fusco in the meeting room that Friday afternoon (April 19th) inquiring why my start time *now* read 0735 am, and Lou's response was; "I don't know why she (Ms. Galloway) changed it ... you have the seniority and I understand why you are upset ... I don't know what is going on, but I'll find out for you ... I think everyone is still in the conference room ... if you have a few minutes ... (and he and Ardy walked to the conference room)"; and finally, four, on the morning of April 22nd the schedule for the rest of the week reflected at 0705 am start time (upon my return that afternoon, it had once again been changed to 0735 am). There was an absolute commitment to the seniority process as well as to me for my preference **to continue** my 0705 am start time. Neither Ardy nor Lou have faulty memories about the events just described. Had I the chance to ask the right questions from all parties concerned, there would have been some different responses! My preference *could not be accommodated* as Mr. Chan so stated for other reasons which he and Ms. Galloway would rather not discuss. It has always been my life-long observation that people with something to hide don't tell the truth!

3. The third and final point I'd like to make regarding Mr. Chan's Step 1 GFTP relates to the very reason why I don't wish for this letter to

even be considered as a prelude to the Step 2 process. The process lacks integrity, neither the treatment nor the procedure is fair. I wrote Mr. Chan a certified letter to which he acknowledged receiving but choose not to comment on during our conference call of May 15, 1996 (See enclosed copy). That letter outlined why I had no confidence in management's ability to be fair in investigating an EEOC-type complaint. And Mr. Chan's response to my GFT served as a reminder that the problem (self-regulation/investigation) is not a personnel problem, but rather it's a system failure and it matters not whether we are talking about a regular GFT or a GFTP/EEO. With regard to the procedural failure, I was amazed by my Senior Manager's complete silence during my portion of the GFTP conference call, after all she was the one who went back each time and did the revised schedule with the 0735 am start times. After my departure from my manager's office, I returned to the bigger outer office to photocopy my timecard and couldn't help but notice her voice responding to Mr. Chan's questions regarding my situation. I stayed at the copy machine only long enough to copy my timecard. I could have stayed longer and taken notes, however, that would lower my ethical standards to that which is practiced every day at our station. And there is no substitute for honesty and integrity. In all fairness I should have had the opportunity to listen and speak to other conference call participants, but that may have forced them to deal with the facts and be drawn that much closer to their true motivations. Opposition to their will is not tolerated and they both make that **very**

> **clear**. I will not be bullied into indifference over how I am treated by management notwithstanding their apparent displeasure to my actions. The facts I outlined in my GFT suggest management has not been particularly "cost conscious" about making changes "to most effectively meed operational needs"; if you'll pay more for less and the group that was disadvantaged was older employees ... guess what?

I have given Federal Express some of the best years of my life and I do not deserve to be treated with such disrespect. I have exercised my prerogative to go outside Federal Express to have my age discrimination facts looked at by independent investigations. I realize this process may take quite some time, but I have always been long on patience. I seek closure on this matter so I can move on the next avenue to be heard. I understand that no retribution policy is still part of the GFTP, although we know of one incident where that was violated ... I can only hope my factual situation doesn't also warrant the disregard fo rush **guarantee**!

Respectfully,

Gerald D. Freeman
FedEx ee#22703

STATE OF _____ CASE NAME _____

CITY/COUNTY OF _____ CASE NO. ___

AFFIDAVIT

I, Vincent J. Maccia , being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 52 years of age, my gender is male and my racial identity is Caucasian .
My date of birth is [REDACTED]/45 . My Social Security number is [REDACTED] .
I reside at 216 Earl Street .
City of Tarpon Springs . County of Pinellas .
State of Florida . Zip Code 34689 .
My telephone number is (including area code) 813-934-2914.

My complaint is against Federal Express Corporation which is located at 1881 Main Street in Dunedin Florida 34698 .
Its telephone number is (including area code) 813-736-6727.
My job classification is (if applicable) Courier . My wage is $14.92 Per Hr .
My Immediate supervisor is (if applicable) Edward Prough Manager Operations .

In my 35 years of employment, I have never witnessed such a radical change in a company's ethical standards as set forth by the Federal Express Corporation in the past three (3) years. These changes, were orchestrated by Federal Express' Corporate headquarters in Memphis, Tennessee, to target their older work force, nationwide! No matter where my travels, in speaking with other Federal Express employees, in states such as, California, Georgia, Louisiana, Washington, Washington D.C., New York, New Jersey, Tennessee, Texas, Nevada, Illinois and within the state of Florida, the ALL displayed the same frustrations with the harassment tactics of management toward them and other senior employees. It's obvious, Federal Express' goals are to reduce their operational cost, rightly so, but not at the expense of their aging work force. This shirking of responsibility by Federal Express has to stop, the older employees made Federal Express what it is today and the liabilities follow in payroll, medical claims, workman compensation claims and the threats of Unionization!

I'm making mention of unionization because it all ties in with Federal Express' tactical ploy to reduce their older work force. Talk of unionization started approximately 6 years ago in the Northeast with the United Auto Workers, UAW. However, serious threats started approximately three years ago with the UAW and most recent with the Teamsters through literature, stickers, meetings, etc., in the Southern region. Begin aware of union activities, Federal Express, now had another reason for reducing their older work force. First, the older employee represented their most costly liability and secondly, a reduction in the older work force would minimize the threat of union organization. I've been angered by the methods management has used to achieve their corporate goal, reduction of the older work force! The pit forms, used by management for no van scans, missing POD's, right day

lates, wrong day lates, airbill errors, compliance numbers being off, etc. These are the tools management used to harass and/or build a profile against their older employees for future use, termination! I was harassed, victimized and discriminated against because of my age and affiliations with above mentioned unions. I became a TARGET!!

Since the departure of Senior Manager Mark Gaines and the arrival of the new senior manager, Terri Galloway, it was apparent that the employees/operations managers were going to change their ways or face disciplinary action and/or termination. Ms. Galloway stated at an AM meeting that most employees would accept the "New" changes and the others would find theses changes difficult. (*In with the new culture and out with the old culture.*) What she was referring to was the Best Practice Pays Program, and how it would benefit the harder working employee. Federal Express has disguised their BPP program as a tool for their employees to earn more moneys but in reality it may have benefited the few. This program is a useful parameter for management to discriminate against their older employees. In previous years this writer attained above satisfactory evaluations being rewarded monetarily as well as the acknowledgement of doing a good job. Now, under this program, an older employee that once attained above average scores on his performance review, may well be just satisfactory or unsatisfactory facing termination. The older employee is working harder, making less money and not able to achieve a sense of accomplishment, as in the past, because of this BPP program.

After one of our senior couriers filed and EEOC complaint, Ms. Galloway at an AM meeting stated that a rumor has been going around that we are "out to get you" (Older Employees). She stated that the new goals and systems were not there to terminate older employees or force early

retirement, in her next breath, she stated we would be held accountable for taking out the maximum number of Priority One stops and Mixed Stops, held accountable for Late Packages, held accountable for missing POD's, (held accountable for everything and anything that management could possibly used against you by inflating your pit form file!) Her message was clear, if you side with the rumors (new goals and systems are out to get older employees), you will be held accountable. Our senior manager's presence fit Federal Express's new image, "Best Practice Pays", No matter how you get the job done, but reducing the cost of labor via intimidation/termination was their true agenda.

There were two reasons why this AM meeting stuck with me; one, I had originally told the courier who filed the EEOC complaint that I would be a witness for him. I wondered for a long time about how confidential the process was and secondly, when the meeting was over, my senior manager, Ms. Galloway approached me on the sort belt and wanted to speak with me in front of my van. Of course her headset was on just in case I said something derogatory, she would have witnesses at the other ends of the headsets. The conversation started with her asking me "I understand you may be interested in part time?" I stated that I considered it four years ago but it would not be advantageous in regards to the benefits I would lose. She stated "Oh no" the only benefit you would lose would be if you were injured off the job, "that's all". Look into it and get back with me." More lies, that was not the only benefit I would lose nor did I appreciate being singled out. (I spoke to ops manager Ardy Piazza some four years ago about part time status) I was again angered and frustrated over the fact she never approached younger employees with this offer of part time status, more discrimination/harassment!!

It also amazes me how the Sunshine District under the leadership of Marco Chan, changed the 90 day company work rule to 30 days, whereas if you are sick or injured and exceeded that 30 day period you were displaced from your route, unless you submitted a letter, and awarded a 15 day extension. This Sunshine District rule has since spread to the Southern region and probably elsewhere by now. The company rule still remains at 90 days. How is an older employee suppose to heal-faster than a younger employee? In most cases, the younger employee would heal faster or go back injured in fear of losing his/hers route. Intimidation works! This goes hand in hand with putting additional pressure on older couriers, making continued employment at Federal Express look that much more unlikely and hopeless.

Federal Express is now hiring more casual employees then in the past, whereas it was common practice to hire permanent part-time and eventually upgraded to full time within three months or sooner. It now takes years before a part time permanent employee is upgraded to full time. Why upgrade a part time employee when management can work a part timer 50/55 hours weekly when most full time employees are struggling to reach 35/40 hours. This practice is condoned by local management as well as upper management rather than paying a senior full time employee wages. I guess loyalty plays a small part in this rapidly changing company!!

Not only are we being intimidated, but our managers are being intimidated to intimidate us or else! Ms. Galloway has always demonstrated all the qualities of an autocratic leader, especially when it came to my manager at the time, Ardy Piazza. This writer was pitted by Mr. Piazza for not being able to recall going from stop 40 to 41 without making several stops in-between, making the mapping of this particular route unproductive. Mr. Piazza failed to follow instructions in

regards to pitting someone for this mapping check. First, it was imperative that he have a copy of this writers delivery record present to check that a delivery wasn't made in-between the mapped recorded stops. This is possible when the airbill is scanned, for whatever reason and not the astra sticker. This tracking system was in its infancy stages, being worked on by a co-worker, who advised me of the flaws. To add to this in-accurate and deceitful pitting was the fact that the day in question was twenty-eight (28) days earlier from the day I was pitted! I signed Mr. Piazza's pit form, knowing he was coerced into doing this by Ms. Galloway. I've worked for and with Ardy Piazza since I started with Federal Express, that being Nov. 19, 1984. In all the years, I know this cowardly act was uncharacteristic of Mr. Piazza. I was hurt and angered at the same time to think a thirteen year working relationship had deteriorated over the threats by one person, Ms. Galloway. Mr. Piazza was in fear of loosing his job! He mentioned this to me several times, possibly in atonement for his unusual behavior. However, the fact remains, my rights were violated, I was discriminated against by Mr. Piazza for the sake of following Ms. Galloways orders and Federal Express' tactics of forcing the older employee to downgrade or quit.

Another incident, involving operations manager Lou Fusco. This writer was approached by Lou Fusco on the sort belt, at which time he stated he would like to speak with me in regards to an accident. I followed Mr. Fusco to the front of my van as he adjusted his headset and making sure it was turned on. He stated to me that I would have to make out an accident report in regards to a puncture in the side wall of my spare tire. I stated that I had no knowledge of my spare tire having a puncture in it. I advised him that I would not make out an accident report and be charged for something someone else did. Mr. Fusco stated that it was Federal Express' policy

to make an accident report out of this. I asked Mr. Fusco if he checked my vehicle inspection report from the previous day, to which he answered "yes". Well the report indicated that everything was okay with my vehicle prior to my departure and that someone else must have driven my vehicle afterwards. I stated that my vehicle shows a full tank of gasoline and that the people who gas and/or washed my vehicle must be responsible. Mr. Fusco's answer to me was "But they are not Federal Express employees." I stated that they didn't have to be Federal Express employees to have an accident or to have damaged my spare tire. Mr Fusco was showing signs of losing his patience with this seesaw verbal confrontation and stated he was going to check further with Larry the mechanic in regards to the spare. Approximately ten minutes later Mr. Fusco returned and stated to this writer that the spare in question did not belong to this writers van and was in my van apparently by mistake. No apologies made, he walked off as if nothing had happened. This is an example of many incidents that took place in an attempt to weaken the morale of many older employees. These types of incidents occurred daily in an attempt to break down the targeted employees. This incident could have been avoided knowing the capabilities of Mr. Fusco and the Clearwater Management Team, in regards to investigating before accusing. Their real intention here was to intimidate and frustrate this writer into saying something derogatory in an attempt to charge me with insubordination. Also, this was another step that management took in trying to build a profile against senior employee as Federal Express's policy is "Three accidents within an eighteen month period is grounds for termination."

Ms. Galloway has on numerous occasions, harassed many older employees with the belt sort. For example, she told me to make sure after sorting the freight into their respected vans,

to go through three baskets of documents checking for mis-sorts. After sorting two of the baskets for routes 111 and 163, this writer returned to his van in an attempt to sort his basket. That's when Ms. Galloway would appear and state "Why are you still here? You have to leave the building!" Attempting to explain the reasons for the delayed building leave time, she would repeat herself and ask the same question, "Why are you still here?" These were unrealistic tasks that could not be completed in the time allotted and she knew this. Month after month of this treatment paid dividends for Federal Express, some employees sought counseling through "Peoples Help" while others chose other employment rather then being harassed further and others transferred out. Every day this writer was challenged mentally as to whether this would be his last day. What surprises would the tactful Ms. Galloway have in store for me today? What did I do wrong today? Will I ever be able to do anything right for Federal Express: Will she/they ever let up? How much more stress can I endure? These were the questions that went through most of the senior employees minds every day. It was a daily hostile environment full of mental and physical harassment.

There is one more point I would like to touch on before my conclusion of this affidavit. I was hired by Federal Express on November 19, 1984, at which time I was 39 years of age. Federal Express was a young, flourishing company on the way up and readily defended by it's employees, as a great company to work for. However, almost 14 year later, at age 52, Federal Express has been taking a long look at their aging work force for which they have mad no provisions.

Case in point, Federal Express has a program called Survey Feedback Action (SEA). This program is a survey given to Federal Express employees to ascertain what their feelings are in regards to local and upper management.

Certain percentages are attainable: favorable, fav/unf, unfavorable and no answers. These percentages are accumulated, screened and discussed by the employees and management. This is done to develop better working procedures, a better understanding of goals and to bring together both the employee and management to better understand each others concerns. Well, this SEA survey is given annually and the questions are the same, at least since my hiring in 1984, to the present day of 1997. The question I'm concerned with is Number 15, which states "CAN BE SURE OF A JOB IF I DO GOOD WORK". In 1994 the favorable line indicated 52 percent, in this years survey the percentage dropped to 33 percent, a drop of 19 percentage points, with approximately five senior employees not taking the survey. This indicates to myself and any co-workers that even if you are doing a good job, with present day management building a profile on you, you are not guaranteed a job. I know that I have performed a good job up till now, however, with the profiles being built on me and every other senior employee, question number 15 will be on a steady decline. Every employee 40 years of age or older with 10 or more years of service are being focused on by management of Federal Express Corporation.

In conclusion to my age discrimination affidavit, the mentioned incidents can and will be substantiated when necessary. Although these mentioned incidents are discriminatory in nature, the insensitivity to which Federal Express imposed their will, should not go unnoticed. Rather then managing their senior employees, Federal Express chose that policing them would be faster and easier in attaining their goal, downsizing their aging work force! This autocratic form of management had an adverse effect on morale of many of my co-workers, myself included. If you were an older employee and didn't agree with Federal Express philosophy

of People, Service, Profit, you were labeled a trouble maker and/or had a attitude problem! The purpose of this labeling was to isolate the more enlightened work-related employee from the newer, gullible employee.

It is this writers conclusion, of the facts stated above, Federal Express Corporate Headquarters in Memphis blueprinted a plan to all Region Heads instructing District and Local Management how they were to avoid unionization at all cost! It is also this writers conclusion, of the facts stated above, Federal Express Corporate Headquarters blueprinted a plan to all Region Heads instructing District and Local Management how they were to avoid the costly issue of an aging work force! It is this writers conclusion, of the facts stated above, that to achieve this plan, you aging and senior employees rights were violated by the continued victimization, harassment, and the misappropriation of authority by management! Addressing these issues are the only assurance that a reoccurrence of this doesn't repeat itself when the next generation of employees enters into the 40 plus age group or reach 10 or more years of service.

AFFIDAVIT (cont)

This section left intentionally blank

I have read and had an opportunity to correct this Affidavit consisting of ____ handwritten □ typed □ pages and swear that these facts are true and correct to the best of my knowledge and belief.

_____

Before me, the undersigned authority, personally appeared _____, who being duly sworn, says under oath that the matters and facts set out in the above document, consisting of _____ pages, true and correct to the best of his/her belief.

Sworn to before me, this ____day of _____, 1997, by _____, who has produced _____as identification.

My Commission expires: _____

(Notary Public)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY	CHARGE NUMBER
⊠EEOC	151980767

* * *

NAME (Indictate Mr., Ms., or Mrs.)
Mr. Vincent J. Maccia

HOME TELEPHONE NO. (Include Area Code)
(813) 934-2914

STREET ADDRESS	CITY, STATE AND ZIP CODE
216 Earl Street	Tarpon Springs, FL 34689

DATE OF BIRTH
[REDACTED]/45

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more than one list below.)*

NAME	TELEPHONE NUMBER
Federal Express Corporation	(813) 736-6727

STREET ADDRESS	CITY, STATE AND ZIP CODE
1881 Main Street	Dunedin, FL 34698

COUNTY
103

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☒ RETALIATION

DATE DISCRIMINATION TOOK PLACE

EARLIEST	*LATEST*
02/04/98	02/05/98

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s))*:

I. PERSONAL HARM:
On February 4, 1998, I was called on the "Dads" unit, and told I had a meeting with Mike Goodling at 1600 hrs", per my supervisor. I was not given any relief to assist with my deliveries. I was told I could not meet later, and I could not have any late deliveries. While in the meeting with Mike Goodling, I was questioned about my reasons for filing an "external EEO complaint". I did not answer any questions on the advise of my attorney.

II. RESPONDENT'S REASON(S) FOR ADVERSE ACTION(S):
I was not given any reason for the meeting with Mike Goodling. I was not given any reason for not being given a relief to assist with my deliveries. I was not given any reason for the harassment.

III. DISCRIMINATION STATEMENT:
I believe I have been retaliated against for filing a previous age discrimination charge (EEOC #15B970133), in violation of the Age Discrimination in Employment Act of 1967.

NOTARY - When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
/s/Vincent J. Maccia

SUBSCRIBED AND SWORN BEFORE ME THIS DATE
(Day, month, and year)
3rd April 98 [NOTARY STAMP]

RE: Addendum to Vincent J. Maccia's EEOC Complaint, Charge # 15B970133

For the record, I would like to state my desire for the following information to be considered as part of my original affidavit:

Once again Federal Express supports my original findings, that is, everything is being orchestrated from Memphis! Mr. Goodling's unscheduled meeting, and not identifying his position within Federal Express, was done intentionally as to make me believe he was still the personnel representative and the person I should confide all my ill feelings to. At the bottom of my letter from Mike Goodling he acknowledges the fact that copies were forwarded to Greg Richards, Labor Attorney for Federal Express, Memphis Tenn., and CoAnn Sims-Ressler, Employee Relations, Head of the Internal EEOC for Federal Express, Memphis, Tenn. This meeting was well planned, although meant to appear subtle in substance. The following event took place prior to our meeting:

On February 4, 1998, received a message via my Dads unit message 10, which was sent at 1351 hrs, while I was on my lunch break. Message was as follows: F.Y.I: "U also have a meeting with Mike Goodling at 1600 thks per Ed". ***Meaning someone else was also scheduled for this meeting.*** My half-hour lunch break was from 1348 hrs to 1418 hrs. It was not until 1418 hrs did I finally receive the above mentioned, message 10. A check of my remaining deliveries revealed approximately 15 to 20 stops. At 1442 hrs, while making a delivery at Tarpon Springs High School, I called my Operations Manager Ed Prough. The conversation went as follows: I advised Mr Prough of approximately 15 deliveries left with 3 of them SOS deliveries, which carries a 1500

commitment time. He stated that a check with dispatch revealed I only had 4 or 5 stops left. If he had checked with dispatch, as he stated, my deliveries would have been subtracted from my total stops via my supertracker. There wasn't an asterisk next to my time on my supertracker which indicates that it was purged, and my stop count was subtracted from my original count. He also stated," didn't dispatch state in that message they were going to send you help?" I stated no. Spoke to dispatch (George), who stated Mr. Prough didn't tell them to send help, that he was waiting for a call from this writer in regards to needing help, more lies and more harassment. I asked Ed if he wanted to eat the lates, to which he stated, no! Get the SOS's off and he would send Brent Patera up to take and delivery the remaining freight. Trying to avoid lates, having to meet up with Brent Patera, and trying to make this 1600 meeting, I ***suggested,*** "why can't you ask Mr. Goodling if it was okay to meet with him around 1630 hrs, I think I would be able to get the rest of the freight off. Ed Prough's reply to me was "because you don't dictate policy around here"! "You be here at 1600 hrs! He said this knowing he didn't and wouldn't contact Brent Patera, knowing I would be under even more pressure because the help would never arrive!

I continued to deliver in a frantic pace and was able to get my SOS pieces off on time, knowing he would check for late pieces and pit me for theses possible rates. I continued heading southeast and delivering while trying to raise Brent Patera on my radio. Now its 1515 hrs with no answer from Brent I tried to contact dispatch without any luck. In my attempts to make contact another pickup courier overheard my radio transmissions and stated she thought she saw Brent at the station and was leaving for the day. I asked her what her location was and to stand by there. Upon meeting with Rt 177, (pickup courier Roseann Gudz) in my haste I stated to

her I didn't have time to explain but I needed to get rid of my remaining freight per management. Now she was upset and stated that she didn't have time to deliver my freight either to which I stated I was sorry but had to leave to make a 1600 hr deadline surprise meeting. Learned later she had to make contact with Route 111, Anthony Best to deliver my packages or she would have possible lates.

Now its 1531 hrs heavy traffic on US 19 with 10 miles to the station. Upset with this unnecessary pressure and unscheduled meeting, I arrived at the CLW Station at 1552 hours. Hurried to park and post trip my vehicle and make this meeting on time, in fear of being charged with insubordination. Upon entering the managers' offices, I observed Jerry Freeman in light conversation and laughing with whom I believed to be Mike Goodling. I was aware Mike Goodling was the personnel representative several years ago and that Kim Taylor was now the personnel representative. With several minutes to spare I followed Jerry Freeman out into the warehouse and questioned him as to him having a meeting with Mike Goodling, knowing he also had an age discrimination charge against Federal Express. Mr. Freeman stated he had no knowledge of any meeting at this time. I observed my senior manager, Mike Reich staring at Jerry and I while in conversation. I returned to the couriers break room before returning to the managers office area, where I observed Mike Reich leaning on Ed Proughs office wall before introducing us, that being Vinny Maccia, Mike Goodling, turned and continue his conversation with Ed Prough. I at that time followed Mr. Goodling into Ardy Piazza's office. Upon Mr Goodling closing the door, he made the mistake of asking me "So how was your day?" I stated "I'm glad you asked, and proceeded to explain the above mentioned events that took place starting at 1418 hours. Mr.

Goodling expressed no concern and proceeded with his agenda.

A short nine-minute dialogue followed with two questions asked by Mr. Goodling. What did I mean by disparate treatment and who threatened me with termination. These questions I stated I would not answer at this time without my attorney. (See attached)

A copy of Mr Goodling's letter dated Feb. 5, 1998 and my response letter dated Feb. 10, 1998, is attached to this document as to what transpired at this meeting.

The following day, on Feb. 5, at approximately 0745 hrs as I was conducting my job on the belt sort, I questioned Ardy Piazza, operations manager, in regards to what position Mike Goodling held with Federal Express. Mr. Piazza hesitated, then stated that he thought he was the personnel representative. I stated that I thought Kim Taylor was our personnel representative. Mr. Piazza replied, he thinks Kim Taylor was experiencing health problems and that Mike Goodling was being sort of grandfather back into his old job but wasn't really sure.

At approximately 0800 hrs, Feb. 5, 1998, I spoke with Ed Prough and questioned him in regards to what policies I was dictating to him the previous day? His reply was "Well, it's actually not a policy but you needed to be here at 1600 hrs. I also asked him why he never sent Brent Patera or contacted dispatch in regards to getting me help to which he stated "You did fine" smiled and walked away. A further check of Brent Patera's whereabouts revealed he had clocked out at the same time I was speaking with Ed Prough from Tarpon Springs High School, 1442 hours. This was Ed Prough's way

of slapping me in the face for the last time, knowing he was transferring to the Lakeland area on February 13, 1998

On Feb. 5, 1998, late afternoon I called and spoke with a Barbara Stiedemann, Enforcement Supervisor, Unit 2, who I related the above mentioned incidents. Barbara stated that Federal Express only had copies of the charges but they could petition for a copy of my affidavit. I then advised her I would type an addendum to my original affidavit and forward it for her files.

I can only state the facts. The emotional duress which Ed Prough, Mike Reich and Mike Goodling put me under was intentional and this unannounced meeting was scheduled as such to catch me off guard in answering questions that would cause myself great harm and complications in my age discrimination charge against Federal Express. Once again, its proof that this is an an ongoing age discrimination plan by Federal Express's upper management to harass, intimidate and position an older employee to contemplate quitting rather then continue to absorbing this punishment. I can only hope, the EEOC can see this as a retaliatory charge and file it as such, so as to put a stop to this sort of harmful treatment.

I declare under penalty of perjury that the Foregoing is true and correct

Date:_____

_____

Charging Party (Signature)

I swear or affirm that I have read the above addendum and that it is true to the best of my knowledge, information and belief.

Signature of Complainant: _____

Notary: _____

SUBSCRIBED AND SWORN TO BEFORE ME ON THIS DATE (Day, Month, and Year) _____

Mr. Vincent Maccia
216 Earl Street
Tarpon Springs, FL 34689

Dear Vincent:

This will confirm our meeting on February 4, 1998, at the CLW FedEx facility located at 1881 Main Street in Dunedin, FL to discuss your allegations of discrimination which you filed against FedEx. During our brief meeting you were asked to provide assistance so your allegations could be investigated. You stated you were advised by your attorney not to answer specific type questions. You were asked questions about your allegations and you declined to answer stating this information was provided on the affidavit you submitted through the EEOC. When asked if you were refusing to cooperate in this investigation and you responded you would not answer certain questions.

This is to advise you the company has an obligation to investigate these allegations and will conduct this investigation with the available information. However, our ability to reach a resolution of your concerns may be hampered by your unwillingness to participate. We hope you will reconsider your declining to participate.

Should you want to help resolve your allegations we are open to your participation.

Regards,

/s/
Mike Goodling
Sr. Personnel Representative
Sunshine District

(800)321-6528

MG/lc

cc: Greg Richards
CoAnn Sims-Ressler

Vincent J. Maccia
216 Earl Street
Tarpon Springs, FL 34689

February 12, 1998

Mr. Michael Goodling
Sr. Personnel Representative - Sunshine District
Federal Express Corporation

RE: INTENT

Dear Mr. Goodling:

This is in response to your undated letter regarding your unannounced, unscheduled meeting on February 4, 1998 at the CLW FedEx facility. I would like to clarify some false and misleading allegations you made in your letter.

If you took the time to review my personnel records before attending this meeting you would have known that my background was in law enforcement. This training has taught me to scrutinize people and events and draw some conclusions about their true intentions. If FedEx had serious intentions about discussing what led me to seek ***federal, state and retaliation*** protection under my external EEOC affidavit the following would have occurred:

1. Federal Express Corporation would have sent someone with the qualifications, ability and authority to resolve a situation of this magnitude.

2. Federal Express Corporation would not have sent an unprofessional person that would pursue a badgering form of questioning and certainly, this representative would

have presented himself properly by immediately identifying their position with FedEx and showing the proper picture ID or appropriate business card.

3. I would think someone in a Sr. Personnel Representative position could have recognized that operation manager Ed Prough, deliberately mishandled the necessary arrangements for me to attend this meeting at the requested time, intentionally causing undue pressure and chaos. This was explained to you prior to the start of your questioning but you expressed no concern and proceeded ***with your agenda***. By you not considering my complaint seriously, this led me to believe that you either ***condoned*** his actions or ***initiated*** them.

4. Finally, Federal Express Corporation should have sent someone who could have maintained a professional demeanor instead of squirming in their chair and making me even more suspicious of the company's true intentions.

Mr. Goodling, in your letter you stated our ability to reach a resolution may be hampered by my unwillingness to participate. Did you forget that I offered to meet with you and my attorney at your convenience to discuss this matter, to which you responded "that cannot happen." Should I have taken your answer to mean Federal Express really doesn't want to resolve our problem?

In the last line of the first paragraph "When asked if you were refusing to cooperated in this investigation" please be advised that your correct question was as follows "So your not willing to help in this investigation". There is a difference between "refusal" and "not willing to help", especially when I left the

door open for a future meeting, with my attorney, of course, being present.

I understand that the company has an obligation to investigate my allegations. However, I would think that information is available to you by petition to the EEOC. I, too, have an obligation to protect my legal rights under federal and state laws.

Due to the many discrepancies in your letter and after only a brief meeting, even you can see it is pertinent that I have legal counsel at any meeting where my rights may be violated under the Privacy Act or under the Notice of Non-Retaliation Requirements.

I can only conclude that the many inconsistencies in your letter as well as the events of February 4th constitutes sloppy communication on the part of Federal Express, which is a good way to mask true intent and keep agendas hidden.

Respectfully,

Vincent J. Maccia #42775

CC: Greg Richards
CoAnn Sims-Ressier

July 12, 1998

Mrs. Barbara Steideman

EEOC-Tampa Office
Pimberlake Fed. Bldg. Annex
501 E. Polk St #1020
Tampa, FL 33602-3945

RE: Charge of Harassment

Dear Mrs. Steideman

Please find enclosed my letter charging Federal Express Corporation, with harassment in addition to my original charge of age discrimination in case number 15B970133. Also included with my letter is some documentation to substantiate my findings.

If you have any questions of concern, please call me at 813 934 2914.

Sincerely,

Vincent J. Maccia
Fed Ex courier #42775
216 Earl St.
Tarpon Springs, FL 34689

RE: Addendum to Vincent J. Maccia's EEOC Complaint, Charge #15B970133

For the record, I would like to state my desire for the following information to be considered as part of my original affidavit:

Once again Federal Express supports my original findings, that is, everything is being put on the older couriers shoulders as far as being held accountable.

On July 1,1998 at approximately 7:25am, my operations manager, Ardy Piazza, approached me at my work station at the belt sort. He questioned me in regards to delivering a ***late*** package on June 29, 1998, at 10:40am. I told him I had no knowledge of delivering a late package that date. At that time, he showed this writer a print out of the package in question. The printout showed it was (pup) picked up on June 26th at 1526hrs and the (pod) proof of delivery was June 29th at 10:40 am to the Hughes residence. Being the service was a ***Priority*** package it was to be delivered before 10:30 or its considered ***late***.

My statement to Mr. Piazza was "this was the second time in the last week or two that you showed me a print out of a late package delivery." "I don't remember the package in question." He stated "You would have remembered it if it was late, wouldn't you?" I answered his question truthfully "I don't know"! He then stated "Why don't you go back to the recipient and see if you could retrieve the package with the astra label on it proving its service commitment. I answered him with astonishment "Go back to the recipients house to check a package delivered two days ago? He stated "yeah, why not?"

In speaking with Tom Finnegan, a senior co-worker next to me, stated that this same thing happen to him last week and Ardy told him also to go back to the recipient an try to retrieve the package. Let it be noted that this type of procedure would never have been asked of you in the past. Ever since this Best Practice Pays Program came into effect, the burden of proof has been put on the couriers and enforced on the targeted ones.

I made a decision this date to retrieve the package, on the suggestion of my manager even though I questioned him in regards to policy and procedure, not knowing what code to go into or the answers to be given in case the recipient was not tolerant to my request. The more I thought about it, retrieving this package was important in protecting myself from someone trying to build a profile of a bad employee, that being, local management, district or upper management in Memphis.

At approximately11:11hrs, on July 1st, while in my delivery mix cycle (code 20) stopped at the Hughes residence 1395 Red Oak Dr. to retrieve the package in question. Explained to Mrs Hughes that it was necessary to retrieve a package per my supervisor, to secure the astra sticker for evidence in a ***late*** package investigation. Looking astonished, she stated she would look for it. Several minutes had passed when she returned with it and handed it to me with the recipient's copy of the airbill still in the plastic pooch. She asked this writer with stone puzzlement written on her face, what's the problem? I stated, that I was being charged with a late delivery according to Federal Expresses ***electronic printout,*** and that the package was supposed to have been delivered before 10:30. She shook her head as her husband came to the door asking, "what's going on?" I left with Mrs. Hughes trying to explain to her husband what took place. The

overnight letter was a standard overnight letter, which has a 3:00pm commitment time, it was checked off on the recipient's copy as well and also printed on the Astra Label, Standard overnight.

At approximately 16:15 hrs, returned to the CLW station and entered Mr. Piazza's office. Asked Mr. Piazza if the late package in question would go against me, become a part of my personnel file or be held accountable when it comes time for my performance review. He stated "Oh no, no, I wouldn't do that." "I'm just trying to get to the root of the problem." I stated maybe you wouldn't hold me accountable, however my previous manager Ed Prough, did! He held me accountable for this same type of thing, late packages to which it cost me money out of my pocket when it came to my performance review. You know that we've had unexplainable electronical malfunctions with the supertrackers, dads units, smart base, etc, yet were held accountable as though its always human error. Mr. Piazza stated that "Yes, it's not always human error, sometimes ***it's electronical,*** however we have to get to the root of the problem."

Let me just state for the record, that many Federal Express employees have been fired for Electronical Falsification especially the targeted ones! How can this be when Federal Express knows about the electronical problems and still cannot correct them. Had I not followed up on my particular case in question Iwould have been held accountable and who knows maybe terminated!

I presented the standard overnight letter to Mr. Piazza, airbill number 3248229622, to which he stated "It was an (sos) standard overnight," seemingly shocked he stated "This is the second package that was retrieved being that Linda Sadivy was the first, another senior courier. He stated that

Linda went back to her customer and retrieved her package, an again it proved to be unexplainable. This writer checked with Linda who stated they never got back with her as to the cause. I thought management wanted to get back to the root of the problem? ***(Electronical Error, not human error)*** He asked to make a copy of the sos in question, to which I stated he could but I needed the original copies for my records. I stated to Mr Piazza, theirs two things here I want to make clear. First, this is **electronical malfunctioning** and secondly **harassment**. I stated that this was not policy for a courier to have to go back to a customer to clear himself and I asked him what's the code I was suppose to be in to conduct my own investigation. He did not answer me. Here again Federal Express shifts the burden of proof on the courier to clear him or herself.

It is this writers and many, many Fed Ex employees opinions that this is the way upper management and local management will build a profile of employees, and fire the targeted ones, whether right or wrong. I believe, my particular case here is a case of someone changing the service of my package on purpose! I believe this was done by upper management without the knowledge of my operations manager, Mr. Piazza whom I have the utmost respect. These types of mishaps just don't happen, some are created. I'm concerned because of being a targeted employee. As of this date, July 12th, Mr Piazza nor any of the CLW management has come forth with an explanation.

This entire conversation was overheard by Ronald Clausnitzer, who was located outside Mr. Piazza's office, and will verify same if need be. (Office door was open)

On July 3rd, returning from working my route approximately 1600 hrs, stopped at my mail slot to check for

new mail. To my amazement, there's a pit form on the questioned late package in my mail slot. Its dated June 30th to which I have 2 days to respond as to why a had a late package! In my frustration, I hastily went to Mr. Piazza's office to find out why this was in my mail slot. Mr. Piazza had left for the weekend.

I am filing this letter for retaliatory charges of harassment and the way management handled this late package charge once they found out it wasn't my fault, but there faulty equipment. This all seems light in nature until it happens to you. These are some of the tactics used by Federal Express to discourage their older employees into choosing quitting, rather than putting up with this relentless harassment.

I declare under penalty, of perjury that the Foregoing is true and correct

Vincent J. Maccia

_____

Fed Ex employee # 42775

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 99-2466-CIV-T-25B

GERALD D. FREEMAN, VINCENT J. MACCIA, RONALD CLAUSNITZER, WAYNE C. TATE, KATHY CREAMER and WILLIAM G. KROLMAN, all Plaintiff *Pro Se,* et al.	)
v.	)
FEDERAL EXPRESS CORPORATION, MARY ALICE TAYLOR, MARCO CHAN, SCOTT BUNKER, SUSAN MARTIN, TERI GALLOWAY, ARDY PIAZZA, LOU FUSCO, SUSAN MATLOCK, et al. Defendants	)

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT OR, ALTERNATIVELY, TO STRIKE THE COMPLAINT *IN TOTO*

Defendants, Federal Express Corporation, Mary Alice Taylor, Marco Chan, Scott Bunker, Susan Martin, Teri Galloway, Ardy Piazza, Lou Fusco, and Susan Matlock, move pursuant to Fed. R. Civ. P. 12(b) to dismiss this action against the individual defendants on the grounds that the complaint fails to state a claim upon which relief can be granted. Defendants move pursuant to Fed. R. Civ. P. 12(f) and 41(b) to dismiss Plaintiffs' complaint or, alternatively, to strike the complaint *in toto* on the grounds that it fails to

comply with the requirements of Fed. R. Civ. P. 8 and contains redundant, immaterial, impertinent, and scandalous matter. In addition, Defendants move to dismiss or strike the allegations of a class action on the grounds that Plaintiffs are not proper class representatives. A memorandum setting forth the facts and law upon which

* * *

UNITED STATES DISTRICT COURT
Southern District of New York

02-CV-3355 (LMM)

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Trompics, individually and on behalf of all others similarly situated,	)
Plaintiffs,	)
v.	)
Federal Express Corporation,	)
Defendant.	)

DECLARATION OF GEORGE ROBERTSON

I, George Robertson, am a witness of lawful age and have personal knowledge of the following facts.

1. I worked for Federal Express Corporation as a courier for approximately sixteen years, until I was terminated on September 8, 2000. I filed a charge of age and disability discrimination against Federal Express Corporation on December 1, 2000. I provided my current address on the charge, 36389 N. Bernice Dave, Lake Villa, Illinois, 60046.

2. My family moved from Lake Villa in March of 2001. For about a month, we stayed with my parents at 2521 Country Hill Court, Lake Carol, Illinois 61046. I submitted a forwarding order to the post office.

3. On April 12, 2001, we moved to our current address: 1450 Livingston Drive, Rockford, Illinois 61107. Again, I submitted a forwarding order to the post office.

4. I did not hear anything from EEOC for a very long time after I filed my charge. In January of February 2002, a legal assistant with Rose & Rose asked me the current status of my charge. Because I had not received any recent information, I wrote to EEOC and asked for the current status of my charge.

5. In response, EEOC sent me a letter dated February 7, 2002 with a notice of right-to-sue dated April 25, 2001 attached. I received these documents shortly after February 7, 2002. I had never seen the right-to-sue notice before. The notice reflects my parents' address in Lake Carol. By the time the notice was sent, I had moved from Lake Carol. Although I left a forwarding order, a copy was neither received there nor received by me in Rockford.

I declare, under penalty of perjury, that the foregoing is true and correct.

_____

George Robertson

August 5, 2002

KENNEDY INTAKE QUESTIONNAIRE

[Fold-out Exhibit, next 2 pages]

BEST AVAILABLE COPY

INTAKE QUES' 'ONNAIRE

hi: form is affected by the Privacy Act ι .974; see Privacy Act Statement on everse before completing this form.

EE USE ONLY
Nam.. (Intake Officer)

lease answer the following questions, telling us briefly why you have been discriminated against in employment. un cer of the EEOC will talk with you after you complete this form.

OB: [redacted]-59 (Please print) SSN: [redacted]

AME: PATRICIA ANN KENNEDY Date: 12-3-01
(First) (Middle Name or Initial) (Last)

DDRESS: 7042 MAIDSTONE CT Phone No. (include area code): 727-376-7042

ITY: NEW PORT RICHEY STATE FL ZIP CODE 34653

ease provide the name of an individual at a different address who is in the local area and who would know how to reach you.

AME: IRENE LEHR RELATIONSHIP: MOTHER TELEPHONE: 727-372-8039

DDRESS: 8039 OLD CR 54 CITY NEW PORT RICHEY STATE FL ZIP CODE 34653

hy do you believe this action was taken against you? (e.g., Race, Color, Religion, Sex, Age, Disability, or National Origin.)

AGE DISCRIMINATION

hat action was taken against you that you believe to be discrimination? What harm, if any, was caused to you or others in your rk situation as a result of that action? (e.g., Discharge, Discipline, or Harassment) (If more space is required, use reverse.)

Over the past several years Management has treated me and Others) differently on virtually every facit of my job, including but not limited to staffing time.; (OVER)

elieve I was discriminated against by: (Check those that apply)

☒ EMPLOYER ☐ UNION (Give Local No.) ☐ EMPLOYMENT AGENCY ☐ OTHER (Specify)

AME: FEDERAL EXPRESS CORP.	NAME:
DDRESS: 1881 MAIN ST DUNEDIN FL 34698	ADDRESS:
ONE: 727-736-6727	PHONE:
proximate number ployed by this employer: 100	What was the most recent date the harm you alleged took place? 12-3-01 AND CONTINUING

you now employed by the employer that you believe discriminated against you? YES

E: OM: 8-17-87 (Date)	NO: APPLIED FOR (Position)	OR: WAS EMPLOYED AS (Position)
RRENT POSITION: COURIER	ON (Date)	UNTIL (DATE) I WAS (Laid off, Fired, etc.)

mally, your identity will be disclosed to the organization which allegedly discriminated against you. you ☒ Consent or ☐ not consent to such disclosure?

e you sought assistance about the action you think was discriminatory from any Government agency, from your n, an attorney, or from any other source? ☒ NO ☐ YES (If answer is yes, complete below.)

ME OF SOURCE OF ASSISTANCE: DATE:

ULTS, IF ANY: N/A

e you filed an EEOC charge in the past? ☒ NO ☐ YES (If answer is yes, complete below.)

OX. DATE FILED:	ORGANIZATION CHARGED:	CHARGE NUMBER (If known):

NATURE Patricia A. Kennedy DATE 12-3-01

Form 283 Patricia A. Kennedy 2-3-02

courier performance reviews; late packages and data scans; on-the-job injuries; and other employee benefits. Several older couriers have lost their jobs and myself and others have lost several thousands of dollars and we have endured a hostile work environment as a result of their discriminatory application of their Best Practice Pays Program.

PRIVACY ACT STATEMENT

(This form is covered by the Privacy Act of 1974; Public Law 93-579. Authority for requesting the personal data and the uses thereof are given below.)

1. *FORM NUMBER/TITLE/DATE. EEOC FORM 283, Intake Questionnaire, August 1987.*

2. *AUTHORITY. 42 U.S.C. § 2000e-5b, 29 U.S.C. § 211, 29 U.S.C. § 626.*

3. *PRINCIPAL PURPOSE. The purpose of this questionnaire is to solicit information to enable the Commission to avoid the intake of matters not within its jurisdiction.*

4. *ROUTINE USES. Information provided on this form will be used by Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over potential charges, complaints or allegations of employment discrimination and to provide such pre-charge filing counseling as is appropriate. Information provided on this form may be disclosed to other State, local and federal agencies as may be appropriate or necessary to carrying out the Commission's functions. This would include employment practices laws. Information may also be disclosed to charging parties in consideration of or in connection with litigation.*

5. *WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION. The providing of this information is voluntary but the failure to do so may hamper the Commission's investigation of a charge of discrimination. It is not mandatory that this form be used to provide the requested information.*

STATE OF FLORIDA CASE NAME _____

CITY/COUNTY OF Dunedin/Pinellas CASE NO. ___

AFFIDAVIT

I, Patricia A. Kennedy, being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 42 years of age, my gender is female and my racial identity is Caucasian.
My date of birth is [REDACTED]/59. My Social Security number is [REDACTED].
I reside at 7042 Maidstone Court.
City of New Port Richey. County of Pasco.
State of Florida. Zip Code 34653.
My telephone number is (including area code) 727-376-7042.

My complaint is against Federal Express Corporation which is located at 1881 Main Street in Dunedin Florida 34698.
Its telephone number is (including area code) 727-736-6727.
My job classification is (if applicable) Courier. My wage is $17.39.
My Immediate supervisor is (if applicable) Chris Savas Operations Manager.

Patricia A. Kennedy's EEOC Affidavit

Since I was hired by FedEx in 1987, I have given 100% to my job which I am proud of. During the first eight years of my career at FedEx, my performance reviews and bonus pay-outs continually reaffirmed my dedication to my customers and my employer. However, over the last several years I feel that FedEx through the "Best Practice Pays" Program has systematically targeted myself and others thereby making it more difficult for me to confirm that work ethic via their contorted measuring stick, *minimum acceptable performance standards* or *MAPS*. I feel that FedEx management and their "industrial engineers" have and still are discriminating against me because of my age. I believe my employer's actions violate my civil rights.

Application of B.P.P. Absenteeism Policy Violates ADEA and ADA:

Even before I turned 40 I felt I was being treated differently because of my age - ability to heal faster and my pre-1988 hiring date. In October of 1995, Federal Express via BPP instituted a 30 day/90 day Route or Job Retention policy for medical absenteeism which had in place "certain criteria" upon which a panel of non-medical ex-operation management people could determine who loses their route for injuries (around 30 days of more) and who loses their station full time slot for injuries (around 90 days or more). In January, 1996, Best Practice Pays declared the need for a new absenteeism policy which could for the first time negatively impact on-the-job injuries and which could lead to discipline up to and including termination. And this policy obviously impacted older, slower to heal workers *plus*, it was absolutely applied in a discriminatory manner. This in 1997 I *became* displaced from the CLW station due to an on-the-job injury, a younger,

post-1988 employee was promoted to full time and took my route and full time slot. But from this displacement I was lucky to find a full time slot open in East Tampa at the MCF station (a much longer commute) and I also learned their older employees were being subjected to the same hostile work environment games as my fellow co-workers at the Dunedin CLW station. It should be noted that my new MCF co-workers were bolder and filed many more EEOC age discrimination affidavits; their inability to grasp how and why they were being treated differently lead most of them to frustration and fear of reprisal. I know of several older couriers who were fired and/or constructively terminated as a result of these BPP policy and procedure changes. I don't know of a single younger employee who lost their job because of such policies. Such policies and procedures and management's ability to determine *"fault"* for accidents occurring in the work place further heightens my frustrations and fears. I don't want to give in to their desire to have me walk away from this job but I often question the pros and cons of whether or not it would be better to walk away versus being fired by a "good" company to work for.

Application of BPP Employee Reviewing Standards and Methods Violates ADEA:

Every year my employer's Survey Feedback Action or SFA promises so long as I do a good job, I'll always have a job! Notwithstanding what FedEx has done with its treatment of on-the-job injuries (many of which are repetitive motion injuries which you get by doing a good job), my company has through its BPP program completely polluted the methods of calculating and defining what is a "good job" to the point that older employees like myself no longer know if we even will have a job tomorrow. In other words, what was once

considered a good enough performance to get a bonus is now borderline for *job retention*.

And these ever-changing BPP *minimum acceptable performance standards (MAPS)* ARE NOT being applied to the younger couriers or there would be many more terminations and/or employees walking away from their jobs amoung this group of younger employees. And this is just one area where the hostile work environment works upon us older employees - where operation managers and industrial engineers keep turning up our numbers trying to pressure us to leave or be terminated while the younger couriers are not being held to the same standards. And as a result of such discrimination, younger couriers stand ready to reap the benefits of another full time slot becoming open.

When BPP was originally introduced in November, 1994 you and your manager were supposed to go out on the road and then sit down and arrive at mutually agreeable productivity goals. And for the first few years, management would attempt to make it appear that they were following this course. However, from time to time management would single out older couriers and try to get them to sign off on unrealistic goals via high pressure and deceit. In the mean time, Memphis has discovered many ways to raise your numbers without our approval by changing the way our productivity is calculated (i.e. adding the time in your delivery cycle for going to and from your route so that any time spent driving in excess of the time allotted would further dilute your productivity efficiency). And although these subversions may appear to be applied to all couriers equally (don't know how generous management is being in calculating their driving time), the fear of accountability remains highest among us older couriers. Also, when management check rides an older courier, they make sure that they increase your stops

per hour goal so that you are lucky to be at a 4 for your review. To make matters worse, my manager is now raising my numbers *at will* because he says Memphis believes our goals should be established by each persons' highest daily productivity for any three days during the previous six weeks. Thus, everyone will be always **UNDER** Memphis' *minimum acceptable performance standards* (MAPS 4 rating) except for those three days for every six week period. Which means we are subject to be terminated on any given day even though in all reality I'm working the best I always have and should be obtaining the highest score, a 7 and bonus. Such an atmosphere invites discriminatory discipline and further increases our hostile work environment.

On or about July 9, 1996 my perception of where and how management had pigeonholed myself and other older couriers within their BPP age discrimination plan became very clear. Our start times were pushed up another 10 minutes per day, but management also found another means to try and portray each one of us as malcontents, slough-offs (i.e. by only permitting us to be in a code 53 and forbidding us the use of the "general package handling, code 30" – while still continuing to hold us accountable for leaving the building after a maximum of 9 minutes of fine sort, code 53 – management knew such 9 minutes would expire every day before the sort was even done, therefore, we would be in code 53 at least twice as long as other couriers and on paper it would appear as though we were dragging our feet by not leaving the building promptly). Then about 5 ½ years later, I received a copy of a letter dated January 30, 2001 which is addressed to the older couriers under operations manager Lou Fusco regarding Code 53 and that after our stretch/flex and pre-trip to please go into a Code 53 (See Exhibit "1"). Management's attempt to revive this earlier discriminatory practice which places older couriers in a bad light and has

further financial impacts upon each of us was still another driving force in filing this complaint. The laws against age discrimination are there to prevent employers from purposely placing older employees in a false light in order to pressure them into quitting and/or being terminated under false or misleading circumstances.

Since the Spring of 1995, management has continually picked at me and other older couriers emotionally and financially by changing our "start times". I feel the initial changes in start times were the direct result of Memphis' discriminatory training program contained in "High-Velocity Culture Change, A Handbook For Managers". As a result of such implementations, younger couriers with less seniority than me have been getting earlier start times so that they are able to take out just as many stops as I do and get more hours than I do. It's not fair! Younger couriers are starting earlier, getting their trucks and packages organized and ready to get on the road when I am just getting to my truck - seeing my packages thrown inside and outside the truck, and then getting pressured by management to leave the building earlier. Management knows it is holding me and others to a higher standard. When I have a day off, management schedules these people to earlier start times, they leave the station better organized with only 80% of my normal route and when I return to work, management throws it in my face that my replacement gets back to the station more quickly than I do. That's one more thing that makes me feel like quitting and finding another job - I know that's how they are trying to force me out. It's hard to continue to do a good job in the hostile work environment that management has created.

Before Best Practice Pays/High-Velocity Culture Change, older couriers always had the earliest start times - it was the easiest money we make in any given day, less time pressure

and better chance to organize your packages to ensure a smoother day. The early start time was one of three reasons us older couriers would bid (by seniority) on a new or open route (better chance for overtime; better organized routing for less mistakes; and better productivity for bigger bonuses). And together these three reasons translate into a larger monthly retirement check down the road. In March of 2000 I signed an offer letter for a route that has always started at 0650 A. M. The offer letter that I was given and signed had a start time of 0700AM, which 10 minute difference really irked me, however, a couple weeks later after repeatedly asking management what day I was to start this route, I was then told my start time would be 0730AM - which was not the specific time stated in offer letter that I signed. When I asked management why I was not asked or assigned to start earlier, I was then told that such extra AM hours were being assigned only to PMers that signed up for extra hours. I then saw PMers that signed up for extra hours working 12 hour days. Management always has a couple different flimsy excuses for discriminating against me, but such obvious discrimination is very upsetting and is meant to drive us away.

My employer has a number of other ways to harass older couriers with alleged errors and missing scan data (they admit to faulty equipment/software - but still want to hold us accountable). Along those lines, recently management has been harassing me about "late" package deliveries. I feel that FedEx has manufactured RDL (right day lates) to show a bad performance on my review. I know I didn't have them and they know other younger couriers have late deliveries almost daily and nothing is said. Management's purpose is clear; they want us to see the disparaging treatment and become so disgusted we quit.

For years I have threatened to quit, threatened to stand up for my rights, but was too afraid to do anything. In the past several months, I have come to realize that by doing nothing I have allowed them to build a stronger case against me with their phony *minimum acceptable performance standards*, their faulty electronic data capturing systems and the other discriminatory BPP policies and procedures. I know I am not alone and many older couriers share my doubts and fears regarding being terminated or forced to retire via management's twisted facts and numbers. We have done a good job. Federal Express does not want us pre-1988 senior employees to continue our employment lest they will have to pay for our retirement health benefits if we can complete 10 continuous years of service between ages 45 and 55. Please force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created within their application of *Best Practice/High-Velocity Culture Change.*

I have read and had an opportunity to correct this Affidavit and Exhibit "1" that together consist of 5 typed pages and swear that these facts are true to the best of my knowledge and belief.

/s/ Patricia A. Kennedy

Before me, the undersigned authority personally appeared Patricia A. Kennedy, who being duly sworn says under oath that the matters and facts set out in the above document, consisting of 6 pages, true and correct to the best of her belief.

Sworn to before me, this 3rd day of December, 2001 by Patricia A. Kennedy who has produced FLORIDA DRIVERS LICENSE as identification.

My Commission expires: /s/ Audrey Mary Maccia (Notary Public)

[stamped seal Audrey Mary Maccia
My commission CC791548
Expires November 17, 2002]

KENNEDY CHARGE OF DISCRIMINATION

[Fold-out Exhibit, next 2 pages]

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

☐ FEPA
☒ EEOC

CHARGE NUMBER: 151A201381

Florida Commission on Human Rel. and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.): Ms. Patricia A. Kennedy #70060

HOME TELEPHONE (Include Area Code): (727) 376-7042

STREET ADDRESS: 7042 Maidstone Court, New Port Richey, FL 34653

CITY, STATE AND ZIP CODE

DATE OF BIRTH: [redacted]1959

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME	NUMBER OF EMPLOYEES, MEMBERS	TELEPHONE (Include Area Code)
Federal Express Corporation	Cat D (501 +)	(813) 736-6727

STREET ADDRESS: 1881 Main Street, Dunedin, FL 34698-0000 CITY, STATE AND ZIP CODE: COUNTY: 103

NAME: TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS: CITY, STATE AND ZIP CODE: COUNTY:

CAUSE OF DISCRIMINATION BASED ON (check appropriate box(es))

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☐ RETALIATION ☒ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST: 10/01/1995 LATEST: 05/01/2002
☒ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I. PERSONAL HARM:

For the first eight years of my employment as a courier of Federal Express, I worked hard and received high performance evaluations and repeated bonuses. Beginning in October, 1995, even before I reached the age of 40, Federal Express systematically began to target me and other more senior and older couriers through the "minimum acceptable practices program" ("MAPS") and the related "Best Practices Pays" Program ("BPP") in adopted in that year. Under these programs Federal Express granted an continues to grant preferences to younger couriers in routes, starting times, and other terms and conditions of employment, and to treat the older couriers less favorably. In addition, older workers are disciplined or threatened with discipline for minor or invented infractions, while younger workers engage in such conduct without issue. I know of several older couriers who have been terminated by Federal Express, and several others who believed that they had to leave instead o being fired or who left because of the hostile environment caused by Federal Express' discriminatory practices against older workers.

My income has been reduced and I have been frustrated and frightened by these discriminatory practices.

+

II. RESPONDENT'S REASON(S) FOR ADVERSE ACTIONS(S):

** Text is Continued on Attached Sheet(s) **

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

5/30/02 Patricia A. Kennedy
Date Charging Party (Signature)

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Month, day and year)

EEOC FORM 5 (Rev. 07/05)

FILE COPY Kennedy 389

Equal Employment Opportunity Commission
Form 5 - Charge of Discrimination, Additional Text

No reason was given.

III. DISCRIMINATION STATEMENT:

I believe I have been discriminated against due to my age 43, (DOB 4/21/59) in violation of the Age Discrimination in Employment Act of 1967, as amended.

FedEx.

Track Shipments
***Detailed* Results**

Tracking Number	827197784381
Reference Number	1078
Ship Date	04/26/2002
Delivered To	Recept/Fml desk
Delivery Location	NEWYORK NY
Delivery Date/Time	04/29/2002 09:38
Signed For By	D.HOLMES
Service Type	Priority Letter

Tracking Options:

- Obtain a Signature Proof of Delivery
- Email these tracking results to one or more recipients
- Track More Shipments

Scan Activity	Date/Time
Delivered NEW YORK NY	04/29/2002 09:38
On FedEx vehicle for delivery NEW YORK NY	04/29/2002 08:27
Arrived at FedEx Destination Location NEW YORK NY	04/29/2002 07:56
On FedEx vehicle for delivery NEWYORK NY	04/29/2002 04:53
Arrived at FedEx Destination Location NEW YORK NY	04/27/2002 10:10
Arrived at Sort Facility NEWARK NJ	04/27/2002 07:53

Left FedEx Sort Facility INDIANAPOLIS IN	04/27/2002 03:56
Held at Sort Facility INDIANAPOLIS IN	04/27/2002 03:26
Left FedEx Ramp DULLES VA	04/26/2002 23:45
Arrived at Sort Facility INDIANAPOLIS IN	04/26/2002 23:44
Left FedEx Origin Location WASHINGTON DC	04/26/2002 22:41
Arrived at FedEx Ramp DULLES VA	04/26/2002 21:12

Email Your Detailed Tracking Results
Enter your email (optional), up to three email addresses as recipients, add your message, and dick on Send Email.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

02-CV-3355 (LMM)

[Filed August 20, 2002]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Thompics, individually and on behalf of all others similarly situated,	)
Plaintiffs,	)
- against -	)
Federal Express Corporation,	)
Defendant.	)

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

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4. THE CHARGE FILED BY ROBERTSON FAILS TO PROVIDE THE PREDICATE FOR OTHERS TO PARTICIPATE IN THIS SUIT.

5. THE COURT SHOULD NOT SANCTION THE EARLY FILING OF PLAINTIFF KENNEDY'S COMPLAINT BECAUSE IT IS IN DEROGATION OF THE IMPORTANT ROLE PLAYED BY THE EEOC IN CONCILIATION OF CHARGES OF AGE DISCRIMINATION.

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Ball v. Abbot Advertising, Inc.,
864 F.2d 419 (6th Cir. 1998)

Barrow v. New Orleans S.S. Association,
932 F.2d 473 (5th Cir. 1991)

Bihler v. Singer Co.,
710 F.2d 96 (3d Cir. 1983)

Dalessandro v. Monk,
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Edelman v. Lynchburg College,
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Gitlitz v. Compagnie Nationale Air France,
129 F.3d 554 (11th Cir. 1997)

Hill v. John Chezik Imports,
869 F.2d 1122 (8th Cir. 1989)

Hipp v. Liberty National Life Insurance Co.,
252 F.3d 1208 (summarizing cases), *reh'g*

Hodge v. New York College of Podiatric Medicine,
157 F.3d 164 (2d Cir. 1998)

Novitsky v. American Consulting Eng'rs,
196 F.3d 699 (7th Cir. 1999)

Rucker v. Great Scott Supermarkets, Inc.,
528 F.2d 393 (1976), *overruled on other grounds* by
Wright v. Tennessee, 628 F.2d 949 (6th Cir. 1980)

St. Louis v. Alverno College,
744 F.2d 1314 (7th Cir. 1984)

Thiessen v. General Electric Capital Corp.,
267 F.3d 1095 (10th Cir. 2000), *cert. denied*,
122 S. Ct. 2614 (2002)

Tolliver v. Xerox Corp.,
918 F.2d 1052 (2d Cir. 1990)

Vance v. Whirlpool Corp.,
707 F.2d 483 *supplemented on other grounds on reh'g*,
716 F.2d 1010 (4th Cir. 1983)

INTRODUCTION

The plaintiffs have not come to grips with this central point: Not one of them has completed the simple steps required to commence a pattern and practice suit for age discrimination against FedEx. Those steps are to: (1) file a timely charge with the EEOC that alleges such discrimination; (2) wait 60 days before filing suit; and (3) if a notice of right to sue has been issued, file suit within 90 days of receipt of the notice. One of the plaintiffs, Patricia Kennedy (a non-New York resident), may have begun the process, but has not yet completed it. Notwithstanding their extensive submissions, the plaintiffs have not shown and cannot show that any of them has satisfied the statutory preconditions in suit under the ADEA.

ARGUMENT

1. The *Freeman* Lawsuit Does Not Provide the Charge Filing Predicate for this Case.

Plaintiffs' peristent reliance on the *Freeman* litigation as the administrative predicate for this action is misplaced. It is the opportunity to conciliate a charge with the EEOC, not later filing of litigation by private plaintiffs, that lies at the heart of the charge-filing requirement. The 60-day waiting period for filing suit under the ADEA is "designed to insure that the primary mechanism of dispute resolution – informal conciliation efforts pursued by the [EEOC] – is fully utilized before individuals are entitled to relief in the federal courts." *Vance v. Whirlpool Corp.*, 707 F.2d 483, 488, *supplemented on other grounds on reh'g*, 716 F.2d 1010 (4th Cir. 1983). That the *Freeman* plaintiffs elected to file a lawsuit that was far more expansive than the charges of age discrimination preceding it does not somehow establish that FedEx was

provided the required opportunity to conciliate with the EEOC with respect to the broad claims of age discrimination asserted in the complaint in this case by completely different plaintiffs. That opportunity can only follow the filing of a charge of discrimination that includes such claims.

Moreover, the *Freeman* complaint itself is a fatally flawed pleading that was dismissed because the plaintiffs refused to file an amended complaint within the time specified by the District Court. Contrary to the plaintiffs' contention, that dismissal operated as an adjudication of the merits of the complaint. The District Court there found that the Complaint was "so verbose that it [was] unreasonably difficult to frame a response." (Morrison Decl. Ex. 9) The Court therefore dismissed the complaint "without prejudice," gave the Plaintiffs "twenty (20) days from [September 25, 2000] within which to file an Amended Complaint," and directed them "to comply with Rule 8 of the Federal Rules of Civil Procedure." *Id.* When the *Freeman* plaintiffs failed to comply with that directive, their complaint was dismissed with prejudice. That conclusion follows from the plain language of Fed. R. Civ. P. 41(b): "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits."

The Order entered by the Eleventh Circuit denying the *Freeman* plaintiffs' motion to voluntarily dismiss their appeal recognizes that the dismissal was with prejudice. In its January 14, 2002 Order, that Court stated that "[b]ecause the plaintiffs did not amend their complaint within the time allowed by the district court, the dismissal order became final upon the expiration of the time allowed for amendment. [Citation omitted.] No certification [for an appeal] was

required under Fed. R. Civ. P. 54(b) **because the September 25, 2000, order resolved all of the claims of all of the parties**. [Citations omitted] **As such, the district court was divested of jurisdiction to take any action except in the aid of this appeal."** (Supplemental Declaration of Carl Morrison ("Morrison Supp. Decl."), Ex. 1 at 1-2 (**emphasis added**)). As required by the Court of Appeals, the Order of the District Court administratively closing the *Freeman* case expressly found that **"this matter was concluded and all proceedings before this Court subsequent to October 23, 2000, were a nullity."** (Morrison Decl. Ex. 11, at 3, **emphasis added**) The *Freeman* litigation likewise is a "nullity" in this Court, and cannot conceivably excuse the failure of the plaintiffs here to comply with the administrative prerequisites to this suit.

2. The Charges of Discrimination filed by the *Freeman* Plaintiffs Fail to Provide the Predicate for this Suit and the Doctrine of Equitable Tolling Does Not Apply.

The charges of discrimination that were the foundation for the claims of the named plaintiffs in the *Freeman* litigation, that was dismissed with prejudice, cannot now be used as a predicate for a new lawsuit filed 18 months later by an entirely new set of plaintiffs in a different court. It is no surprise that plainliffs do not cite any cases to support their outlandish argument, as, to the best of defendant's knowledge, no court anywhere has ever sanctioned such an expansive application of the "single filing" rule.[1]

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[1] To the extent that plaintiffs rely on *Tolliver* for this proposition, it should be noted that there have been substantive changes to the ADEA subsequent to the *Tolliver* decision. *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990). In *Tolliver*, the Second Ciruit merely decided that 18 plaintiffs who had previously opted into a class action, piggybacking on the claims of the named plaintiffs in

Plaintiffs implicitly concede that the EEOC charges filed by Gerald Freeman and Vincent Maccia, both plaintiffs in the *Freeman* litigation, could not satisfy even the most liberal standard for application of the "single filing" rule.[2] These charges allege only individual claims of discrimination. (FedEx Mem. at 8; Morrison Decl. Ex. 8) They therefore rely on the affidavits that Freeman and Maccia apparently submitted to the EEOC prior to the time they filed the

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that action that had timely commenced suit, could continue to piggyback on the charges of the named plaintiffs who had once represented them following decertification of the class. *See id.* at 1055. Thus, they could file their own, individual suits. *See id.* At the time of the *Tolliver* decision, the ADEA contained requirement Title VII's requirement that a suit must be filed not later than 90 days following receipt of a right-to-sue letter. *See id.* at 1057. Therefore, the *Tolliver* court also opined in dictum that the piggybacking rule in the ADEA context might not be limited to "permit[ting plaintiffs] to join a prexsiting suit in which at least one named plaintiff has filed a timely charge." The Court reasoned that such a rule would not be in clear conflict with statutory procedure present in Title VII actions. *Id.* Now, of course, the situation is different because the Civil Rights Act of 1991 amended the ADEA, in relevant part, to add a requirement that plaintiffs sue not later than 90 days after receiving final notice from the EEOC of its disposition of their charges. *See* 29 U.S.C. § 626(e). Dictum from *Tolliver* cannot abrogate this new statutory requirement. Additionally, unlike this case, the claims made by the decertified plaintiffs in *Tolliver* were within the scope of the filed EEOC charge.

[2] Notwithstanding the dismissal of their claims in the Freeman litigation, on May 9, 2002, Freeman, Maccia and certain others bound by the result in Freeman sued FedEx again. *See* Complaint in *Anthony W. Bost v. Federal Express Corporation*, 8:02-CV-837-17 MSS, Middle District of Florida. (Morrison Supp. Decl., Ex. 3) FedEx has moved to dismiss their claims with prejudice.

employment discrimination charges that were served on FedEx. (Plaintiff' Exhibits Submitted in Opposition to the Defendant's Motion to Dismiss the Complaint ("Pls. Ex.") 1-2) These unsworn, undated and unsigned affidavits are not sufficient, however, to overcome the defects in plaintiffs' complaint. It is correct that under some limited circumstances a plaintiff may rely upon affidavits and other materials filed with the EEOC before a formal charge of discrimination for purposes of assessing the timeliness of an EEOC charge.[3] But the courts do not sanction the use of undisclosed materials compiled as part of the EEOC's charge intake process to expand the scope of the formal charge that is actually served on the respondent employer for purposes of satisfying the "single filing" rule. That is because it is the charge served on the employer that necessarily defines the scope of the conciliation efforts between the EEOC and the employer.[4] Plaintiffs do not allege that the written materials upon which they now rely were served on FedEx. The documents

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[3] *See*, e.g., Edelman v. Lynchburg College, 122 S. Ct. 1145 (2002) (upholding EEOC regulation stating that an otherwise timely filed charge of discrimination under Title VII may be verified after filing); Bihler v. Singer Co., 710 F.2d 96, 99 (3d Cir. 1983) (charge must provide notice to the EEOC "of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act's machinery", and it "must sufficiently inform the EEOC whether it was to investigate immediately or to await further communication from the [potential plaintiff] before investigation").

[4] The ADEA, 29 U.S.C. § 626(d)(2), provides that "[u]pon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

themselves state that they are confidential and ordinarily would not be disclosed.[5] In fact, they were not disclosed prior to commencement of the *Freeman* litigation. (Morrison Supp. Decl., at ¶ 6)

In further recognition of the fact that the individual EEOC charges filed by Freeman and Maccia, non-parties to this action, do not provide the notice required by *Tolliver,* plaintiffs point fingers at the EEOC, claiming that they are to blame for the content, or lack thereof, of the charges. This argument like the others, is without merit. In *Novitsky v. American Consulting Eng'rs,* 196 F.3d 699, 702 (7th Cir. 1999), the court of appeals debunked the myth that charging parties should not be bound by the charges that they actually signed:

> Only the charge is sent to the employer, and therefore only the charge can affect the process of conciliation. What is more, the charge is not the work of a faceless bureaucrat, leaving victims of discrimination helpless

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[5] The Freeman and the Maccia affidavits each state: "I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding." (Pls. Ex. 1 at 3; Pl. Ex. 2 at 1) Plainly the EEOC did not consider them to be charges of discrimination. Moreover, the form completed by Freeman makes that point explicitly: "ROUTINE USES. Information provided on this form will be used by Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over potential charges, complaints or allegations of employement discrimination and to provide such pre-charge filing counseling as is appropriate." (Emphasis added; Pls. Ex. 1 at 2.)

> protect themselves. Complainants are free to draft and file charges on their own, or hire attorneys to do so, and a charge drafted by the EEOC's staff is not filed unless the complainant signs it–as Novitsky did. If she had been dissatisfied with the staff's understanding of her answers, all she had to do was point this out and ask for an addition.
>
> ....People are free to sign legal documents without reading them, but the documents are binding whether read or not. [Citation omitted.] Any other approach would undermine the validity of the written word and encourage people either to close their eyes (hoping that they can reap the benefits without incurring the costs and risks of the venture) or to come up with hard-to-refute tales of not reading or understanding the documents they sign.
>
> ....[W]hether or not the complainant had a lawyer, whether or not she sought or listened to counsel, indeed, whether or not she read or understood the charge, it was her charge, and it did not put her former eanployer on notice of [the claim at issue.]

The plaintiff here have offered no evidence that the EEOC refused to accept a charge, or told them that the intake questionnaire and a charge are the same thing. There is no foundation offered by the plaintiffs for treating their confidential intake questionnaires and affidavits as charges of employment discrimination, and there is certainly no foundation for the proposition that FedEx was presented with the required opportunity to conciliate an allegation of class-wide discrimination.

For these reasons, as well as those stated in FedEx's initial brief, the EEOC affidavits of Freeman and Maccia could not provide the predicate for the "single-filing" rule, even if their lawsuit had not already been dismissed with prejudice.

The plaintiffs are also wrong to suggest that the "similarly situated" test for opt-in class actions under the ADEA is the test in this Circuit for application of the single-filing rule, Pls.' Mem. at 10. These are entirely distinct concepts that serve entirely different purposes: the similarly situated test relates to the power of the court to proceed on behalf of a class of employees under ADEA, while the single-filing rule defines when non-charging parties may file a discrimination suit in reliance on a charge filed by another.[6] Even in collective actions under the ADEA, it is first necessary to find that "the EEOC charge actually filed gave the employer notice of the collective or class-wide nature of the charge." *Gitlitz v. Compagnie Nationale Air France,* 129 F.3d 554,

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[6] Class actions under the ADEA are authorized by 29 U.S.C. § 626(b), which expressly borrows the opt-in class action mechanism of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b). Section 216(b) provides for a class action where the complaining employees are "similarly situated." The courts have adopted a number of different approaches to determining whether an ADEA action may proceed on behalf of a class using the "similarly situated" test *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1216-18 (summarizing cases), *reh'g & reh'g en banc denied*, 273 F.3d 1118 (11th Cir. 2001), *cert. denied,* 122 S. Ct. 1064 (2002); *Thiessen v. General Electric Capital Corp.*, 267 F.3 1095, 1102-1103 (10th Cir. 2001) (same), *cert. denied,* 122 S. Ct. 2614 (2002). The very different issue presented to this court is whether the plaintiffs' claims are due to be dismissed because of their complete failure to satisfy the charge filing and other statutory conditions to the commencement of this suit.

558 (11th Cir. 1997). Similarly, the rule in this Circuit is that "there must be some indicatiom that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim. Such a claim alerts the EEOC that more is alleged than an isolated act of discrimination and **affords sufficient notice to the employer to explore conciliation with the affected group.**" *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1058 (2d Cir. 1990) (emphasis added). Recognizing that they cannot meet this test, plaintiffs pretend that it does not exist.[7] But the fact remains that FedEx has never been served with any charge of discrimination that provides the requisite notice of alleged discrimination against the plaintiffs here, who themselves never filed charges of employment discrimination.

Finally, plaintiffs' argument that their lawsuit should be saved by application of general principles of equitable tolling is without merit. First, these principles are not designed to excuse an employee's ignorance of the legal requirements applicable to his claim. *Barrow v. New Orleans S.S. Ass'n.*, 932 F.2d 473, 478 (5th Cir. 1991) (neither lack of knowledge of applicable filing deadlines nor unfamiliarity with the legal process and lack of legal representation will toll limitations period). The Eleventh Circuit has conclusively determined that the failure of the *Freeman* plaintiffs to amend the complaint within the time specified by the District Court

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[7] Even the decision of the Seventh Circuit that is relied upon by the plaintiffs (Pls. Mem. at 9) requires that "the charge must, as the very least, contain an allegation of class-wide discrimination. This notification is necessary in order to satisfy Congress' express desire that the defendant understand, during the conciliation stage, the magnitude of his potential liability." Anderson v. Montgomery Ward & Co. 852 F.2d 1008, 1016 (7th Cir. 1988). Plaintiffs fail to meet this test as well as that set forth in Tolliver.

"resolved all the claims of the parties," and did so as of October 23, 2000. (Morrison Supp. Decl., Ex. 2, at 2) Thus, even if the Court accepts the plaintiffs' argument that the dismissal of the *Freeman* suit was without prejudice to re-filing it after the Court's stated deadline for amending the complaint, and plaintiffs have the benefit of tolling from October 26, 1999, when that suit was filed, until October 23, 2000, when it was dismissed, the 90 day period for others relying on the *Freeman* charges to file suit expired well before commencement of this action on April 30, 2002. Second, the plaintiffs attempt to join the *Freeman* litigation is of no legal consequence to this case: that case was already dismissed at the time they tried to join. At the end of the day, there is no amount of legal gamesmanship that excuses the named plaintiffs in this action from complying with the simple administrative steps necessary to commence an action under the ADEA. In fact, one of them, Patricia Kennedy, claims to be in the process of doing just that.

3. Plaintiff Robertson's Declaration Does Not Overcome the Presumption that He or His Authorized Agents Received the Notice of Right to Sue More than 90 Days Before the Commencement of this Suit.

Robertson's argument that he is a timely filing plaintiff because he did not receive the April 25, 2001 Notice of Right to sue until February 7, 2002 is without merit. The EEOC's regulations, and the charge form, required Robertson to notify the Commission, not the postal service, of any change of address. (29 C.F.R. 1601.7(b); Morrison Decl. Ex. 4 at 1.) As a result of these regulations, which impose a duty of diligence on charging parties, courts generally hold that a plaintiff is not entitled to equitable tolling where the plaintiff has failed to advise the EEOC of a change of address since the filing of the charge, and where the EEOC mailed the

Notice of Right to Sue to the last address for the charging party shown on its records. *Hill v. John Chezik Imports,* 869 F.2d 1122, 1124 (8th Cir. 1989) (the period normally runs from the date the letter is received at the most recent address provided to the EEOC; barring the action, even though the EEOC failed to send a copy of the notice to the charging party's attorney); *Ball v. Abbot Advertising, Inc.*, 864 F.2d 419, 421 (6th Cir. 1988) (same; providing a new address to the state human rights agency in insufficient); *St. Louis v. Alverno College,* 744 F.2d 1314, 1316-17 (7th Cir. 1984) (the period runs from the date the letter is received at the most recent address given to the EEOC; failure to receive the letter was the charging party's fault).

In addition to the above, Robertson's argument fails to address the presumption that his parents, whose address is on the letter according to Robertson's Declaration, received the letter, were authorized by Robertson to do so and, in all likelihood, advised him of it. At best, the declaration suggests that Robertson did nothing for over 10 months to apprise himself of the status of his charge, and he should not be allowed to benefit here from his decision to ignore the agency responsible for handling his charge of employment discrimination.

4. The Charge Filed by Robertson Fails to Provide the Predicate for Others to Participate in this Suit.

Robortson's charge alleges only an individual complaint of age and disability discrimination: "I was employed at Respondent since approximately 1984. As a result of a work place injury I became a person with a disability. My performance has always been excellent. In August 2000, Respondent refused to allow me to take my accrued leave. I was denied additional benefits to which I was entitled. On

September 8, 2000 I was temainated." (Morrison Decl. Ex. 4) There is no hint in this charge of class-wide discrimination that could provide a basis for others to rely upon Robertson's charge under the "single-filing" rule in this Circuit.[8]

5. The Court Should Not Sanction the Early Filing of Plaintiff Kennedy's Complaint Because It is in Derogation of the Important Role Played by the EEOC in Conciliation of Charges of Age Discrimination.

FedEx has yet to be served with any charge of discrimination filed by Patricia Kennedy.[9] (Morrison Supp. Decl., at ¶ 7) According to the plaintiffs' submission, the

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[8] For the convenience of the parties and the witnesses, New York is not the appropriate venue for adjudication of Robertson's complaint. It is undisputed that Robertson is a resident of Illinois, and that he was terminated by FedEx from his job as a courier in that state. (Pls. Ex. 5; Morrison Decl. Ex. 2, at 15) If Mr. Robertson is allowed to proceed with his complaint in this Court, FedEx will request the Court to transfer it to the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a).

[9] For precisely the same reasons explained above with respect to the EEOC affidavits filed by Freeman and Maccia, there is no legal foundation for measuring the 60-day waiting period from the date of Kennedy's submission of an intake questionnaire and affidavit to the EEOC. Like the other affidavits, the Kennedy Affidavit states expressly that it "will be considered confidential" and will not be disclosed unless the government is required to produce it in a formal proceeding. (Pl. Ex. 6, at 2) These documents were first disclosed to FedEx in the plaintiffs' filing with this Court on August 5, 2002. (Morrison Supp. Decl., at ¶ 8) These are not documents that trigger the conciliation opportunity required by law. See *supra*, n. 4.

charge has been filed and was amended on or about July 1, 2002. (Pls. Ex. 7) It is therefore undisputed that the complaint in this action was filed well before the expiration of the statutory 60-day waiting period that is a jurisdictional prerequisite to commencement of suit under the ADEA. *Dalessandro v. Monk,* 864 F.2d 6, 8 (2d Cir. 1988) ("[C]ourts have uniformly held the sixty-day waiting period under section 626(d) to be a jurisdiction requirement for private plainfiffs.") The failure to wait 60 days ordinarily requires dismissal unless special facts warrant equitable relief. *Rucker v. Great Scott Supermarkets, Inc.,* 528 F.2d 393, 395 (1976), *overruled on other grounds by Wright v. Tennessee,* 628 F.2d 949 (6th Cir. 1980). There are no special circumstances that justify the early filing here.

Plaintiffs' reliance on *Hedge v. New York College of Podiatric Medicine,* 157 F.3d 164 (2d Cir. 1998) is seriously misplaced. The complainant there filed a timely charge and withdrew it pursuant to a settlement agreement that was invalid under the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f). He then filed suit. At the time of the invalid settlement, the complainant's charge had been pending "well over the minimum 60-day period that Congress established for the EEOC to investigate or attempt conciliation before the ADEA plainfiff is allowed to file suit in Court," and Hodge was then "entitled to bring suit..." *Id.* at 168. Under those limited circumstances the Court held that "we see no statutory purpose to be served by a refiling or reopening requirement, the effect of which would be the imposition of additional delays, including another 60-day waiting period." *Id.* The Court emphasized that its "holding is extremely narrow. [It] specifically [did] not decide whether an ADEA Plaintiff whose EEOC charge was pending less than 60 days when withdrawn pursuant to an invalid settlement must refile or seek to reopen the EEOC proceedings before bringing suit."

Id. Thus, *Hodge* in no way supports the complete evisceration of the statutory 60-day waiting period proposed by the plaintiffs here. There simply is no plausible justification for Ms. Kennedy's decision to file this lawsuit early. The complaint therefore should be dismissed without prejudice to Ms. Kennedy's right to re-file it in an appropriate venue.[10]

6. Plaintiffs Cannot Change the Parties to the Lawsuit Without Compliance with Fed. R. Civ. P. 15.

The complaint was filed on behalf of fourteen named plaintiffs including "Nancy Thrompics." FedEx has no record of any such employee. (Morrison Decl., ¶ 3) Plaintiffs' cavalier response to this undisputed fact is to say that they meant to sue on behalf of "Nancy Trompics." ("Pls. Mem. at 6 n. 2) While the issue may very well have been one of a misspelling, the proper method to deal with such mistake is to make a motion to amend or correct, not to unilaterally amend the style of the case to delete Ms. Thompics and replace her with Ms. Trompics. More important, however, is the fact that the identification of Nancy Trompics does not change the legal deficiencies in plainfiifs' complaint. Plaintiffs do not contend, nor could they, that Ms. Trompics filed any charge of age discrimination prior to commencement of this action. Thus, if the Court allows her to participate in this action, her ciaim is due to be dismissed because she, like the other

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[10] For the convenience of the parties and the witnesses. New York is not the appropriate venue for adjudication of Patricia Kennedy's complaint. She alleges in her charge that she resides in Florida, and was discriminated against by FedEx in her employment there. (Pls. Ex. 7) If Ms. Kennedy elects to re-file her complaint in this Court, FedEx will request the Court transfer it to an appropriate venue pursuant to 28 U.S.C. § 1404(a).

plaintiffs, failed to comply with the prerequisites to suit under the ADEA.

CONCLUSION

For the reasons stated, the Court should dismiss the complaint in this action because none of the fourteen plaintiffs have complied with the statutory conditions precedent to suit. It is undisputed that twelve of the plaintiffs either never filed a charge of age discrimination or allowed the period for filing suit to expire.[11] Plaintiff Robertson has failed to overcome the presumption that he or his anthorized agent received his right to sue letter many months before this lawsuit was filed, and he cannot sue FedEx now. Plaintiff Kennedy has not complied with the 60-day waiting period that is a jurisdictional predicate for suit under the ADEA. Her claim is due to be dismissed without prejudice to her right to re-file it in an appropriate forum at the appropriate time.

Dated: New York, New York
August 20, 2002

Respectfully submitted,

By: /s/ _____
Traycee Ellen Klein, Esq. (TK 2755)

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[11] The following eleven plaintiffs never filed a charge of discrimination against FedEx: Paul Holowecki, Donna Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank Martinez, Kelly Martinez, Kenneth Murtchler, and Nancy Trompics. Kevin McQuillan filed a charge, but his notice of right to sue was mailed on June 11, 1999, and plaintiffs apparently concede that McQuillan received his notice.

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

02 Civ. 3355(LMM)

[Filed October 8, 2002]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Trompics, individually and on behalf of others similarly situated, Plaintiff,	)
v.	)
FEDERAL EXPRESS CORPORATION, Defendant.	)

JUDGES: Lawrence M. McKenna, U.S.D.J.

MEMORANDUM AND ORDER

McKENNA, D.J.

Plaintiffs Paul Holowecki, et al. ("plaintiffs")[1] bring this action against their employer or former employer, defendant Federal Express Corporation ("Federal Express"), alleging age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA"), the New York Human Rights Law ("NYHRL"), and the laws of California, Florida, Illinois, Michigan, and New Jersey. Federal Express moves to dismiss the complaint, which was filed on April 30, 2002, under Federal Rules of Civil Procedure 12(b)(1)("Rule 12(b)(1)") and 12(b)(6) ("Rule 12(b)(6)") on the grounds that plaintiffs' claims are time-barred under 29 U.S.C. § 626(d). For the reasons set forth below, the Court grants the motion.

BACKGROUND

Plaintiffs, who are at least 40 years of age, are or were employed by Federal Express as couriers. (Compl. ¶ 6.) They bring this suit on behalf of themselves and others similarly situated. (*Id.*)

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[1] In the complaint, plaintiff Nancy Trompics's name is misspelled as Nancy Thompics. Plaintiffs subsequently corrected the caption in their opposition to defendant's motion to dismiss. Federal Express now argues that plaintiffs violated Federal Rule of Civil Procedure 15 by not requesting leave of the court before amending the caption. The Court treats plaintiffs' correction of the caption as a request to amend and finds the requirements of Rule 15 satisfied. *See* Fed. R. Civ. P 15(a) ("leave [to amend] shall be freely given when justice so requires."); *Arfons v. E.I. Du Pont De Nemours & Co.*, 261 F.2d 434, 435 (2d Cir. 1958) ("It is now well established that dismissals for mere technical defects or ambiguities in pleadings are not favored.").

Federal Express is a corporation engaged in the transportation of packages by air and ground throughout the United States and elsewhere. (*Id.* ¶ 3.) Federal Express is an employer within the definition and coverage of 29 U.S.C. § 630(b) of the ADEA, the New York Human Rights law, and other state laws prohibiting age discrimination. (*Id.* ¶ 5.)

Prior to this action, two of the plaintiffs, Kevin McQuillan ("McQuillan") and George Robertson ("Robertson") filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (Morrison Decl. ¶¶ 5-7.) McQuillan filed a charge with the EEOC alleging age discrimination on September 11, 1998. (*Id.*, Ex. 3.) The EEOC found no cause to believe discrimination had occurred and issued a notice of right to sue on June 11, 1999. (*Id.*) Robertson filed a charge with the EEOC alleging age and disability discrimination on December 1, 2000. (*Id.*, Ex. 4.) The EEOC dismissed the charge and issued a notice of right to sue on April 25, 2001. (*Id.*) In addition, on December 3, 2001, plaintiff Patricia Kennedy ("Kennedy") filed a questionnaire and affidavit with the EEOC on behalf of herself and others alleging age discrimination by Federal Express. (Pl.'s Ex. 6.) She formally filed a charge of discrimination with the EEOC on May 30, 2002, one month after the current action was commenced. (Pl.'s Ex. 7.) Federal Express has no record of charges of discrimination being filed by any of the other named plaintiffs. (Morrison Decl. ¶ 7.)

Plaintiffs allege in the current action that since 1994, when Federal Express adopted certain practices and procedures, and each year thereafter, Federal Express has followed a pattern or practice of employment procedures that discriminate because of age against plaintiffs and other

similarly situated experienced couriers who are over 40 years old. (Compl. ¶¶ 12, 23.)

Federal Express moves to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) on the grounds that plaintiffs failed to file a charge of discrimination with the EEOC prior to bringing the current lawsuit. Plaintiffs oppose the motion, stating that even though 11 plaintiffs in this case did not file charges with the EEOC, the single filing rule allows them to "piggyback" their claims onto the charges filed by either Jack Haneline II ("Haneline") or those filed by the plaintiffs in *Freeman et al. v. Federal Express*, No. 99-2466 (M.D.Fl. Sept. 25, 2000), *aff'd*, 2002 U.S. App. LEXIS 5816, 2002 WL 187185 (11th Cir. 2002) ("*Freeman*"). Neither Haneline nor the *Freeman* plaintiffs are plaintiffs in the current action. These charges are described briefly below.

A. The Haneline Charge

In May 1995, Haneline filed a charge with the EEOC, alleging that he was personally discriminated against under Title VII and the ADEA. (Compl. ¶ 29; Morrison Decl., Ex. 5.) The EEOC dismissed this charge in June 1996, but Haneline never filed suit. (Morrison Decl., Ex. 5.)

B. Charges filed by Plaintiffs in *Freeman et al. v. Federal Express*

Between 1996 and 1998, six Federal Express employees filed charges with the EEOC, alleging that they were personally subject to age discrimination. (Morrison Decl., Ex. 8.) These charges were dismissed. (*Id.*) Subsequently, on October 26, 1999, these employees brought an action in federal court alleging age discrimination. (Pl.'s Ex. 3.) No class was ever certified in the *Freeman* litigation, and the case

was dismissed without prejudice by the district court on September 25, 2000. (Morrison Decl. ¶¶ 11-12, Ex. 9.)

Some of the plaintiffs in this case attempted to join the *Freeman* suit in March 2001 by listing themselves as parties in a proposed amended complaint that the *Freeman* plaintiffs sought to file with the District Court on March 6, 2001. (Morrison Decl. ¶13, Ex. 10.) No order was ever issued granting the *Freeman* plaintiffs leave to amend, or allowing the plaintiffs in this action to join the *Freeman* litigation. (Morrison Decl. ¶ 13.)

STANDARD OF REVIEW

When deciding a motion to dismiss, the court must "assum[e] the truth of all factual allegations contained in the complaint and draw[] all inferences in the plaintiff's favor." *Boyd v. Nationwide Mut. Ins. Co.*, 208 F.3d 406, 409 (2d Cir. 2000); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993). Normally the court must limit itself "to a consideration of the facts that appear on the face of the complaint." *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir. 1984). However, in resolving a motion to dismiss under Rule 12(b)(1), a district court may refer to evidence outside the pleadings. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). In addition, if a defendant's motion to dismiss is for failure to state a claim, the court can consider any documents attached to the complaint as exhibits or incorporated into the complaint by reference. *Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 662 (2d Cir. 1996). In such cases, the court may also consider any documents upon which a plaintiff "solely relies" and which are "integral" to its claims. *Int'l Audiotext Network, Inc. v. AT&T*, 62 F.3d 69, 72 (2d Cir. 1995); *see also Cortec*

Indus., Inc. v. Sum Holding L.P., 949 F.2d 42 (2d Cir. 1991).

DISCUSSION

A. Section 626(d) of the ADEA

Section 626(d) of the ADEA provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed-
>
> > (1) within 180 days after the alleged unlawful practice occurred; or
> > (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

29 U.S.C. § 626(d).

Because New York "has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such

discriminatory practice," an individual alleging age discrimination occurring in this state has 300 days after the alleged unlawful activity to file a charge with the EEOC. 29 U.S.C. § 633(b).[2] An ADEA action may be commenced in federal court: (i) as early as sixty days after filing a charge of discrimination with the EEOC, or (ii) as late as ninety days after receiving an EEOC right-to-sue notice. *See id.* § 626 (d), (e); *Vollinger v. Merrill Lynch & Co., Inc.*, 198 F. Supp. 2d 433, 439 (S.D.N.Y. 2002).

An exception to the ADEA's time limitations is the single filing rule. "The single filing rule provides that where one plaintiff has filed a timely charge of discrimination with the appropriate administrative agency, other non-filing plaintiffs may join in a later action in federal court if their individual claims arise out of similar discriminatory treatment in the same time frame." *Levy v. United States Gen. Accounting Office*, No. 97 Civ. 4016, 97 Civ. 4488, 1998 U.S. Dist. LEXIS 5567, 1998 WL 193191, at *2 (S.D.N.Y. Apr. 22, 1998), *aff'd*, 175 F.3d 254 (2d Cir. 1999); *see Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2d Cir. 1986). In *Tolliver v. Xerox Corp.*, the Second Circuit held that in addition to allowing non-filing plaintiffs to opt into an existing action, the single filing rule allowed non-filing plaintiffs to file their own individual actions when they had attempted to opt into a class action brought by filing plaintiffs, but the class had later been decertified. 918 F.2d 1052 (2d Cir. 1990). The filing

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[2] The Court notes that the laws of the other states under which plaintiff brings suit also have provisions prohibiting age discrimination. *See* Cal. Gov't Code § 12900 *et seq.* (California); Fla. Stat. Ann. § 112.043 - .044, § 760.01 (Florida); Ill. Comp. Stat. Ann. Ch. 775, act 5/1-101 *et seq.* (Illinois); Mich. Comp. Laws Ann. § 37.2102 *et seq.* (Michigan); N.J. Stat. Ann. §§ 10:3-1, 10:5-1 (New Jersey).

plaintiff's charge, however, must have contained "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim." *Id.* at 1058. "Such a claim alerts the EEOC that more is alleged than an isolated act of discrimination and affords sufficient notice to the employer to explore conciliation with the affected group." *Id.* "The rationale for this rule is to avoid needless repetition in the filing of administrative charges when the initial claim was sufficient to put the employer on notice of the alleged violations and afford the employer an opportunity for conciliation with the aggrieved employees." *Levy*, 1998 U.S. Dist. LEXIS 5567, 1998 WL 193191, at *2.

B. ADEA Claims of McQuillan and Robertson

McQuillan and Robertson did file charges with the EEOC before bringing this suit. However, these filings were untimely. McQuillan filed his charge with the EEOC on September 11, 1998, nearly four years after the implementation of the policies challenged in this lawsuit. (Morrison Decl., Ex. 3.) Robertson filed his EEOC charge on December 1, 2000, over six years after plaintiffs claim the policies were implemented. (*Id.*, Ex. 4.) Since McQuillan and Robertson did not file their EEOC charges within 300 days of the alleged unlawful practice, as is required by the ADEA, their claims are time-barred.

C. Kennedy's ADEA Claim

Kennedy filed an administrative charge on May 30, 2002, one month after the complaint in this case was filed. (Pl.'s Ex. 7.) Therefore, she has failed to meet the requirement of Section 626(d) that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge

alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." 29 U.S.C. § 626(d). Kennedy argues that her filing of a questionnaire and affidavit with the EEOC in December 2001 satisfies the charge requirement. (Pl.'s Ex. 6.) If that were true, Kennedy's claim in this action would be timely since more than 60 days would have passed since she filed her EEOC charge. However, the Court rejects this argument.

Section 626(d) specifically requires that a "charge" be filed with the EEOC prior to commencing a civil action. 29 U.S.C. § 626(d). If Congress had intended that an intake questionnaire or affidavit constituted sufficient notice to the EEOC of alleged discrimination, it could have specifically stated so, but it did not. While it is true that on occasion, courts have found that an intake questionnaire constitutes a formal charge, *see, e.g., Angotti v. Kenyon & Kenyon*, 929 F. Supp. 651 (S.D.N.Y. 1996); *O'Connor v. Pan Am*, No. 88 Civ. 5962, 1990 U.S. Dist. LEXIS 5403, 1990 WL 118286 (S.D.N.Y. May 4, 1990); *Halas v. Ford Motor Co.*, 987 F. Supp. 227 (W.D.N.Y. 1997), these cases involved situations where the plaintiff had been led by the EEOC to believe that the questionnaire alone constituted sufficient notice to the EEOC of the alleged discrimination. Such is not the case here. Therefore, the Court finds that Kennedy's questionnaire and affidavit should not be considered the equivalent of a charge, and that her charge, dated May 30, 2002, was untimely since it was filed one month after the current action was commenced.

D. ADEA Claims of the other 11 Plaintiffs

The other 11 plaintiffs never filed charges with the EEOC. However, they argue that they are covered by the single filing rule, which in limited circumstances, permits a

party who has not filed an administrative charge to participate in a lawsuit by piggybacking on the administrative charge of another party who has properly commenced suit. These plaintiffs attempt to "piggyback" on either the actions brought by Haneline or the plaintiffs in *Freeman*. However, the Court finds that neither charge allows plaintiffs to take advantage of the single filing rule.

1. The Haneline Charge

While Haneline filed a charge, this charge alleged that he was being discriminated against personally. (Morrison Decl., Ex. 5.) It failed to give the EEOC "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim." *Tolliver*, 918 F.2d at 1058. Therefore, the plaintiffs in this action are unable to bring this suit based on Haneline's charge.[3]

2. The *Freeman* charges

Similarly, none of the charges filed by the *Freeman* plaintiffs gave any indication that the grievance affected a group of individuals. (Morrison Decl., Ex. 8.) Therefore, the plaintiffs may not piggyback off of these charges. As discussed above, the Court also rejects plaintiffs' argument that because their questionnaires and affidavits alleged group

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[3] Moreover, while Haneline received a notice of right to sue in June 1996, he never commenced a lawsuit. As the Fifth Circuit has recently noted, "no circuit has ever authorized piggybacking on an EEOC charge when the individual who filed the charge never actually filed suit." *Bettcher v. Brown Schools, Inc.*, 262 F.3d 492, 495 (5th Cir. 2001).

discrimination, the single filing rule is applicable. As the Seventh Circuit has stated:

> [I]t is the charge rather than the questionnaire that matters. Only the charge is sent to the employer, and therefore only the charge can affect the process of conciliation. What is more, the charge is not the work of a faceless bureaucrat, leaving victims of discrimination helpless to protect themselves. Complainants are free to draft and file charges on their own, or hire attorneys to do so, and a charge drafted by the EEOC's staff is not filed unless the complainant signs it ... If she had been dissatisfied with the staff's understanding of her answers, all she had to do was point this out and ask for an addition.

Novitsky v. Am. Consulting Eng'rs, L.L.C., 196 F.3d 699, 702 (7th Cir. 1999).

The Court also notes that *Freeman* is distinguishable from *Tolliver*, in which the single filing rule was held to be applicable. In *Tolliver*, 18 employees who had not filed administrative charges opted into an existing ADEA class action, in which plaintiffs had filed valid administrative charges. 918 F.2d at 1055. The class, however, was later decertified. The Second Circuit allowed the non-filing employees to then bring individual actions by piggybacking on the charges of the filing plaintiffs, despite the class decertification. *Id.* at 1057.

Unlike *Tolliver*, however, the district court never certified a class in *Freeman*. (Morrison Decl. ¶¶ 11-12, Ex. 9.) In addition, the plaintiffs in this action attempted to become part of the Freeman action only after it had been dismissed. (Morrison Decl. ¶ 13, Ex. 10.) The Court declines to extend

the single filing rule to a case containing such procedural differences. *See Bliss v. Rochester City Sch. Dist.*, 196 F. Supp. 2d 314, 323 (W.D.N.Y. 2002) ("[P]laintiff also argues that she was not required to file any charge at all because she considers herself to be a member of a class action in the *Seils* case, and she attempts to 'piggyback' on the charges filed in that case ... [T]his argument fails because no class was ever certified in the *Seils* case").

D. Plaintiffs' State Law Claims

Because plaintiffs' federal claims under the ADEA are dismissed, and plaintiffs are not asserting subject matter jurisdiction under 28 U.S.C. § 1332, the Court declines to retain jurisdiction over plaintiffs' state claims. *See Rocco v. New York State Teamster's Conference Pension and Ret. Fund*, 281 F.3d 62, 72 (2d Cir. 2002).

CONCLUSION

For the foregoing reasons, the Court grants Federal Express's motion to dismiss plaintiffs' ADEA claims, without leave to replead. Because the Court dismisses plaintiffs' federal claims, it declines to exercise jurisdiction over plaintiffs' state law claims. Complaint dismissed.

Dated: October 8, 2002

New York, New York

SO ORDERED.

/s/
Lawrence M. McKenna
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

02 CIVIL 3355(LMM)

[Filed October 23, 2002]

PAUL HOLOWECKI, et.al.,
Plaintiff,

-against-

FEDERAL EXPRESS CORP.,
Defendants.

JUDGMENT

Defendant having moved to dismiss pursuant to FRCP 12(b)(1) & (6), and the matter having come before the Honorable Lawrence M McKenna, United States District Judge, and the Court, on October 8, 2002, having rendered its Memorandum and Order granting defendant's motion to dismiss plaintiffs' ADEA claims without leave to replead, and declining to exercise jurisdiction over the state law claims, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dated October 8, 2002, defendant's motion to dismiss plaintiffs' ADEA claims is hereby granted without leave to replead and the Court declines to exercise jurisdiction over the state law claims.

DATED: NYC, NY

October 23, 2002

JAMES M. PARKISON

Clerk of Court

BY:

/s/ James M. Parkison

Deputy Clerk

UNITED STATES DISTRICT COURT
Southern District of New York

02-CV-3355 (LMM)

[Filed October 23, 2002]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Trompics, individually and on behalf of others similarly situated, Plaintiff,	)
v.	)
FEDERAL EXPRESS CORPORATION, Defendant.	)

MEMORANDUM IN SUPPORT OF MOTION TO ALTER AND AMEND THE MEMORANDUM AND ORDER OF OCTOBER 9, 2002

Plaintiffs have moved to alter or amend because this Court's Memorandum and Order of October 9, 2002, overlook the decision in *Edelman v. Lynchburg College*, __ U.S. __, 122 S. Ct. 1145 (2002) and a valid EEO regulation defining a charge 29 C.F.R 1626.6 and 1628(b). Those authorities provide that the first written statement of a complainant is a charge if it identifies the employer and the nature of the discriminatory conduct. Accordingly, the affidavits of Kennedy and Robertson were charges filed more

that 60 days before this suit was filed; and they placed EEOC on notice of the class-wide nature of the allegations of Federal Express' past and continuing conduct made by the plaintiffs in these cases. Those charges support their own claims and the claims of 11 of the 12 other plaintiffs.

In addition, the Memo. fails to hold that the charge of Robertson and perhaps that the Complaint alleges unlawful employment practices by defendant from 1994 through the present. Complaint, paras. 23, 24 and 30. Where the plaintiff alleges a pattern or practice of continuing unlawful practices, each discriminatory event presents a viable and timely claim. *National Railroad Passenger Corp v. Morgan*, 122 S.Ct. 2061, 2071 (2002); and *Bazemore v. Friday*, 478 U.S. 385, 395-396 (1986).

In addition, the Memo. seeks to prevent several plaintiffs from joining this suit by distinguishing the Second Circuit's decision in *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990), *cert. den.* 490 U.S. 985, on grounds that are incompatible with that decision. Under a correct application of that decision, those plaintiffs are permitted to join the case without any class certification. We note that the Memo addressed that timeliness of administrative charges (and the period of time for the plaintiff can seek relief) issue prematurely, and the Court should permit discovery on the defendant's statute of limitations defense, on the question of when and what of charges of age discrimination were filed by couriers and which of those charges (if any) were settled by Federal Express. *Zipes v. Trans World Airlines*, 455 U.S. 385 (1892).

1. The Affidavits of Kennedy and Robertson Were Charges that Were Timely Filed More Than 60 Days Before This Suit was Filed, and Placed EEOC on Notice of the Allegations of Class and Wide Continuing Discriminaton; Those Charges Support the Claims of 13 out of the 14 Plaintiffs.[1]

This Court has ruled that the charges of Plaintiffs Kennedy, Robertson and McQuillan were "untimely" and rejected plaintiff's arguments that the questionnaire and affidavits they and other plaintiffs filed constituted a charge as defined by the valid regulations of the U.S. Equal Employment Opportunity Commission ("EEOC"). Memorandum and Order ("Memo") at pp. 8-9, and 10-11. The Court's ruling overlooks and is contrary to the decision in *Edelman v. Lynchburg College*, *supra*, 122 S. Ct. 1145 and the valid regulations of the EEOC. 29 C.F.R. 1626 and 1628 (b) and (c).

The Supreme Court ruled: "We accordingly hold the EEOC's relation-back regulation to be an unassailable interpretation of Sec 706" of Title VII. *Edelman v. Lynchburg College*, *supra*, 122 S.Ct. at 1149-1153 (quote from 1152). The EEOC regulations under Title VII and the ADEA both provide in substantively identical terms that the intake questionnaire and the five page affidavit Plaintiff Kennedy was a charge when she filed it on December 3, 2001, and the affidavits filed by Robertson and other plaintiffs were

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[1] Plaintiffs do not challenge Morrison's affidavit insofar as it shows that EEOC sent McQuillan a right to sue letter on June 11, 1999, and that he did not fil suit. Morrison Aff. para. 3, Def. Ex.3. Nor do they challenge the law as stated in the Court's footnote 3, p. 10. Accordingly, this motion does not seek to continue the participation of McQuillan in this suit.

charges, when filed. 29 C.F.R. 1601.12(b) ("Title VII"); 29 (1626.6) and 29 C.F.R.1628(b).

The charge filing requirement of ADEA was to a large extent modeled after the filing provision of Title VII. *Tolliver v. Xerox Corp., supra* 918 F.2d at 1055.

In her affidavit and questionnaire Plaintiff Kennedy named and provided an address for Federal Express Corporation, and gave five pages of detail under oath about the age discriminatory application of Federal Express' employment practices that she and other older couriers were receiving from Fed. Ex. P. Ex. 6, Affidavit, pp. 1-5. In that charge she stated that the Best Practices Pays ("BPP") policy of Federal Express "was absolutely applied in a discriminatory manner...I know of several older couriers who were fired and/or constructively terminated as a result of this BPP policy...I don't know of a single younger employee who lost his job because of such policies." P. Ex. 6, Aff. at p. 2. She also charged that "Federal Express does not want us pre-1988 employees to continue our employment lest they will have to pay for our retirement health benefits if we can complete 10 continuous years between (ages) 45 and 55." *Id.* at p. 5.

The ADEA regulation states "...a charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory acts." 29 C.F.R. 1626.6. The regulation also states that "notwithstanding the provisions of para. (a) of this section charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing that conforms to Section 1626.6." 29 C.F.R. 1626.8(b). Memo. See to the contrary, at pp. 8-10.

Under the valid regulation of EEOC, therefore, Plaintiff Kennedy filed her charge on December 3, 2001, more than 60 days before the filing of this suit, when she filed her affidavit and filled out a questionnaire on that date. P. Ex. 6.

This Memo reasoned that "If Congress intended that an intake questionnaire or affidavit constituted sufficient notice to the EEOC of alleged discrimination, it could have specifically stated so, but it did not." Memo. at p. 8. While it is true that Congress could specifically have defined the term "charge", it chose not to do so. As the Supreme Court ruled, "neither provision [of Title VII] defines charge, which is likewise undefined elsewhere in the statute." *Edelman v. Lynchburg College*, *supra*, 122 S. Ct. at 1149.

Similarly, Congress chose not to define the word "charge" in the ADEA when it adopted a charge filing requirement similar to that of Title VII into the ADEA. Sec. 4(d) and Sec. 11 of the ADEA, 29 U.S.C. 623(d) and 631. Rather the ADEA granted broad authority to the EEOC to "issue such rules and regulations as it may consider necessary or appropriate for carrying out" the provisions of the ADEA. Sec. 9, 29 U.S.C. 628. The regulations of EEOC under Title VII of the ADEA are consistent with the purpose of both acts.

Title VII requires a charge to be under oath. Sec. 706(b) of Title VII, 42 U.S.C. 2000e-5(b). Neither the ADEA nor the regulation implementing it imposes that requirement. Sec. 4(d), 29 U.S.C. 623(d); and 29 C.F.R. 1626 and 1628. The minimum necessary to file a charge under the ADEA is less than that under Title VII. The written statement of Kennedy was sufficient when filed to satisfy the higher requirements of a Title VII charge, because it was under oath, and because it identified the employer and the general nature of the allegations of discrimination. P. Ex. 6. Her charge was more

than sufficient to satisfy the lesser standard of the ADEA for filing a charge. 29 C.F.R. 1626;29 C.F.R. 1628 (b).

The Supreme Court sustained, without dissent, the EEOC regulation under Title VII defining what kind of written statement is adequate to be considered a charge as valid and lawful under that Act. *Edelman v. Lynchburg College*, *supra*, 122 S. Ct. at 1150-1152. The holding and reasoning of the Court applies to the ADEA, and EEOC's regulation issued thereunder, because the Title VII procedure and regulation predated and was a model for that of the ADEA, and both statutes are administered by EEOC. *Edelman v. Lynchburg College*, *supra*, 122 S. Ct. at 1152 ("the regulation was six years old" in 1972 "and had been upheld and applied by the federal courts" by that time); *Tolliver v. Xerox Corp.*, *supra*, 918 F.2d at 1055-56. Congress is therefore presumed to have expressed its consent to the Title VII regulation of EEOC. *Id.*

This Court relied upon a 1999 decision of the Seventh Circuit in ruling that Plaintiff Kennedy's charge was untimely. *Notivitsky v. Am. Consulting Eng'rs, L.L.C.*, 196 F.3d 699, 702 (7th Cir. 1999). That 1999 decision rested in significant part on the ability of complainants and their attorneys to draft charges, and the fact that complainants are free to refuse to sign the charge. 196 F.3d at 701-702, quoted at Memo. p. 11.

This Court's holding that a questionnaire and affidavit is not the charge, however, cannot survive the later decision of the Supreme Court, which rejects the reasoning that the charging party is responsible for signing a charge, even if it does not convey the essential elements of the affidavit and questionnaire of the charging party, by holding that Title VII is a "remedial scheme in which laypersons, rather than

lawyers, are expected to initiate the process." *Edelman, supra*, 122 S.Ct. at 1150.[2]

In any event, the holding in *Edelman v. Lynchburg College, supra*, makes it clear that the EEOC regulation is the appropriate measure of what constitutes a charge, rather than the form on which the written statements make. *Id.* Accordingly, the language quoted from *Notivitsky v. Am. Consulting Eng'rs, L.L.C.*, 196 F.3d at 702 cannot survive the intervening decision in *Edelman v. Lynchburg College, supra*.

Plaintiff Kennedy's affidavit of December 3, 2001 identified the name and address of the employer, and the nature of the conduct of which she complained. P Ex. 6. That statement was more than adequate to advise the EEOC of the identity of the employer, and the age based nature of her complaint, and that she was alleging that other older couriers were being harmed, and therefore was a charge under the lawful regulation of EEOC. 29 C.F.R. 1626 and 29 C.F.R. 1628(b).

Under the single filing rule, the 11 plaintiffs who did not file charges are able to piggy back onto the charges of Plaintiff' Kennedy and Robertson, because their affidavits gave the EEOC notice of allegations of company wide discrimination against older couriers. *Tolliver v. Xerox Corp., supra* 918 F.2d 10 at 1056-59.

Similarly, Freeman and Maccia also filed detailed answers to questionnaires and affidavits that provided EEOC with

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[2] While the Supreme Court did not cite the *Notivitsky* decision, it understood that it was resolving a conflict among the circuits. 122 S.Ct. 12248-49.

ample notice of what kinds of age discriminatory conduct they alleged in Plaintiffs' Exhibits 1 and 2. They too provided ample notice to EEOC of the scope of the discriminatory conduct against them and other older couriers they were seeking to have corrected. *Id.* Those written statements were also charges within the definition of the valid regulation of the EEOC, and showed that EEOC was on notice by June 6, 1996 of the charge of a widespread national pattern or practice of age discriminatory conduct at least through March, 2002 when the *Freeman* case ended.

2. The Charges of Robertson and Kennedy Were Timely Filed within 300 Days of the Injury They Suffered from Federal Express' Continued and Continuing Discriminatory Practices.

Under settled law, a claim under Federal equal employment opportunity law does not arise until the "alleged unlawful practice" has occurred. *National Railroad Passenger Corp v. Morgan*, ___U.S. __, 122 S. Ct. 2061, 2070 (2002); 29 U.S.C. 623(d); 42 U.S.C. 2000e-5(e)(1); See also, *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Each discriminatory practice occurs on the date it happened. When an employer engages in a pattern of discriminatory conduct over time, it creates viable and timely claims each time it engages in any unlawful practice. *National Railroad Passenger Corp. v. Morgan, supra*, 122 S.Ct. at 2071; *Bazemore v. Friday*, 478 U.S. 385, 395-396 (1986)

This Court ruled, without citation to either of those cases, that Plaintiff Robertson's charge was untimely, because is was not filed within 300 days of the implementation of the pattern of alleged unlawful practices in Nov. 1994, but "over six years after plaintiffs' claim they were implemented." Memo. at p. 8. Although the Court's decision does not expressly so

hold, the Court's ruling may also have been applied to Plaintiff Kennedy, because the Court dismissal of the Complaint is "without leave to re-plead." Memo. at p. 13.

However, the Complaint (paras. 23, 24 and 30) unambiguously alleges both that the age discriminatory practices of the defendant commenced in 1994, and that those discriminatory practices continue and have continued each year, and are a pattern of continuing behavior and conduct of defendant Federal Express. The Complaint states that Federal Expressed commenced the discriminatory practices in 1994 and "each year thereafter Federal Express has followed" a pattern practice of employment procedures that discriminate because against plaintiffs and others similarily situated courier over 40....". And that "[e]mployment practices that discriminate against older couriers and favor younger couriers...are the prevailing pattern or practice of Federal Express" and that "Federal Express has continued to follow that pattern or practice to the present" and "... has no plans to end that practice." Complaint, Paras. 23 and 24. In addition the Complaint alleges that "Unless restrained by order of this Court, the defendant will continue to pursue policies and practices that are the same or similar or related to the policies and practices alleged." Complaint, Par. 30. The allegations of the Complaint must of course be accepted as true on a motion to dismiss. Memo. at p. 5.

The Memorandum of the Court erred in ruling that the charges of Robertson and (perhaps) Kennedy were untimely, because that ruling fails to recognize that each application of the discriminatory policy or plan constitutes a discrete act of discrimination and starts or restarts the period of limitations for each employee harmed, so that the 300 day limitations period for filing a charge starts to run from the most recent application of that policy. *Bazemore, supra*; *Nation Passenger*

Corp. v. Morgan, supra; *Courtney v. La Salle University*, 124 F.3d 499, 505 (3d Cir. 1997); and *Rivera-Rodriguez v. Frito Lay Snacks Caribbean*, 265 F.3d 14, 21-22 (1st Cir. 2001).

The Complaint does not make any allegation that Federal Express adopted facially discriminatory practices beginning in 1994, but alleges that Federal Express adopted new employment practices which were intended to and did have a discriminatory effect, and/or were applied in a discriminatory way.

Plaintiff Robertson alleges that he was harmed by defendant's practices in August, 2000 and that he was wrongfully discharged because of his age on September 7 or 8, 2000; and he filed his formal charge on December 1, 2000, less than ninety days from the date of the discharge. Deft. Ex. 4. His charge was timely filed.

Yet under the Memo of this Court, Plaintiff Robertson could not have filed a charge the same date that he was terminated, because that date is more than five years after Federal Express began its discriminatory practices in 1994. Memo at pp. 3 and 8. Deft. Ex. 4. Similarly, Plaintiff Kennedy's charge alleges discrimination against her beginning in October, 1995, when she was less than 40 years of age, at an age when she could not have filed a charge under the ADEA. She alleges that Federal Express has continued to discriminate against her on the basis of age each year thereafter, thereby reducing her income each year, through the date the formal charge was filed on May 30, 2002. P. Ex. 6 and P. Ex. 7. Under settled law, therefore, the charges of Robertson and Kennedy were timely when filed.[3]

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[3] The Complaint alleges that "Some of the Plaintiffs' in this case timely notified the EEOC of the discriminatory practices by Federal

3. The Decision in Tolliver v. Xerox Corp. is Applicable to This Case.

This Court ruled that the *Freeman* charges and case did not place Federal Express on notice of allegations that it engaged in a nationwide pattern or practice of discrimination against older couriers and attempted to distinguish the decision in *Tolliver v. Xerox Corp.*, 918 F.2d 2, 1052 (2d Cir. 1990) because 1) "the district court never certified a class" in that case; and 2) because [some of] "the plaintiffs in this action attempted to become part of the Freeman case after it had been dismissed." Memo. pp. 11-12.

By virtue of the opt-in provisions of the ADEA, a suit under the ADEA that alleges discrimination against plaintiffs and others similarly situated is a collective action when filed. "The ADEA....expressly authorizes employees to bring collective age discrimination actions..." *Sperling v. Hoffman La Roche*, 493 U.S. 165, 169 (1989).

The *Freeman* case was such an action by six plaintiffs under the ADEA, and no class certification was necessary to make it one.

The Second Circuit has ruled that the "Application of the single filing rule to individual actions is fully warranted."

Express more than 60 days prior to this date." Para. 29, last sentence. The charges of Kennedy and Robertson support this claim. In addition, Plaintiff Robertson has offered a declaration that he did not receive the right to sue letter issued by EEOC until February 7, 2002, less than 90 days before this suit was filed. P. Ex. 5. The factual issues concerning Federal Express' affirmative defense that he did not file within 90 days of the issuance of the right to sue letter is not ripe for decision on this motion to dismiss.

Tolliver v. Xerox Corp., *supra*, 918 F.2d at 1057. In addition, because the administrative charges in the earlier filed suit had "alerted the EEOC to a claim of age discrimination throughout the company's domestic operations" they were sufficient to support the claims of the 18 plaintiffs in the prior suit who had not themselves filed administrative claims. 918 F.2d at 1059-1060.

On March 6, 2001, plaintiffs in the *Freeman* case in Florida filed an Amended Complaint, adding plaintiffs Kubicki, Lewis, McQuillan, Moncalieri, Nelson, Tucker and others to the *Freeman* case. Deft. Ex. 7, Docket # 112. That Amended Complaint was filed while the *Freeman* case was pending on appeal, and before any answer was filed by defendant Federal Express Corporation. Deft. Ex. 7. Those six Plaintiffs and the original plaintiff had a right to file an amended pleading once as a matter of course "before a responsive pleading is filed." Rule 15(a), Fed. R. Civ. P. Moreover, the district court in the *Freeman* case had entered orders expressly extending the time for filing an amended complaint to replace the verbose complaint "that the court had dismissed without prejudice on Sept. 25, 2000. Deft. Ex. 7, Docket #s 103 and 104. Their claim therefore related back to October 26, 1999, the date of the filing of the *Freeman* suit. Rule 15(c), Fed. R. Civ. P.

The first Amended Complaint placed Federal Express in March, 2001 on further notice of the claims of seven of the plaintiffs in this case that the nationwide pattern of behavior was continuing. Federal Express had been placed on notice of those allegations at least from June 1996. Accordingly, Federal Express was on continuous notice at least since June, 1996 of the allegations of a nationwide pattern of discriminatory practices against older couriers, at least until the district court in *Freeman* granted defendant's motion to

terminate that case administratively on March 28, 2002. Docket # 129. Accord: *Burnette v. N.Y. Central R. Co.*, 380 U.S. 424, 428-434 (1965).

The charges of Robertson and Kennedy were sufficient to continue that notice for all plaintiffs from 2000 through that notice until this case was filed on April 29, 2002, because the charges were filed in 2000 and 2001 and before any right to sue letter was received by them. In any event any defense by the defendant based upon failure to file this suit in a timely fashion is an affirmative defense, in which the defendant has the burden of proof. Accordingly, resolution of that issue should be deferred until after the parties have had the opportunity to conduct discovery.

CONCLUSION

For the reasons set forth above, the motion should be granted, and this Court should enter an Order of the kind submitted herewith, vacating the Order of Oct. 9, 2002, and denying the motion to dismiss.

Respectfully submitted,

/s/
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October 23, 2002.

UNITED STATES OF DISTRICT COURT
Southern District of New York

Case No.:02-cv-3355(LMM)

[Filed November 6, 2002]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Thompics, individually and on behalf of others similarly situated, Plaintiff,	)
v.	)
FEDERAL EXPRESS CORPORATION, Defendant.	)

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO ALTER AND AMEND THE MEMORANDUM AND ORDER OF OCTOBER 9, 2002

Defendant Federal Express Corp. submits this Memorandum in Response to Plaintiffs' Motion to Alter and Amend the Memorandum and Order of this Court dismissing Plaintiffs' claims in their entirety with prejudice. Plaintiffs' motion is brought pursuant to Fed. R. Civ. Proc. 59(e). As set forth herein, Plaintiffs' motion should be denied.

1. Standards Applicable to a Motion to Reconsider under Rule 59(e).

The standard for granting a motion for reconsideration uuder Rule 59(e) is strict, and such a motion will generally be denied unless the moving party can point to controlling decisions or data that the Court overlooked – matters that might reasonably be expected to alter the conclusion reached by the court. *Rmed Int'l. Inc. v. Sloan's Supermarkets, Inc.*, 207 F. Supp. 2d 292, 295 (S.D.N.Y. 2002), citing *Shrader v. CSX Transp. Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). A motion for reconsideration is not to be used as a substitute for an appeal. *Rmed Int'l*, 207 F. Supp. 2dl at 292, *citing Morales v. Quintiles Transnat'l Corp.*, 25 F. Supp. 2d 369, 372 (S.D.N.Y. 1998). Under local rule 6.3 of the United States District Court for the Southern District of New York, a motion for reconsideration should be narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court. *Rmed Int'l*, 207 F. Supp. 2d at 296.

2. The Decision in *Edelman v. Lynchburg College* is inapplicable.

Plainiiffs first claim that the Court overlooked the Supreme Court's decision in, *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002), by holding that the intake questionnaires and affidavits presented by Kennedy and Robertson cannot constitute charges for purposes of the single filing rule. In their focus on *Edelman*, Plaintiffs persist in their refusal to acknowledge that the issue in the instant case is the single filing rule, i.e. whether a filed charge can serve as as the basis for piggybacking by non charge-filing

plaintiffs.[1] *Edelman* concerned whether a charging party's affidavit and questionnaire can serve as an individual charge of discrimination for purposes of satisfying the time limits applicable to filing an individual charge. Accordingly, there was no reason for this Court to cite the *Edelman* decision in its order granting FedEx's motion to dismiss.

Even though the Court rightly did not cite *Edelman* in its order, the Court did in fact consider and reject the proposition that Plaintiffs advanced by citing *Edelman*. By arguing that the intake questionnaires constituted charges, Plaintiffs ask the Court to leap to the unsupported conclusion that the notification purposes underlying the single filing rule have been served. As set forth in the following language from this Court's decision, the Court explicitly considered and flatly rejected Plaintiffs' theory:

> While it is true that on occasion, courts have found that an intake questionnaire constitutes a formal charge, [citations omitted], these cases involved situations where the plaintiff had been led by the EEOC to believe that the questionnaire alone constituted sufficient notice to the EEOC of the alleged discrimination. Such is not the case here. Therefore, the Court finds that Kennedy's

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[1] For example, Plaintiffs continue to harp on the language contained in Kennedy's intake questiotmaire that was never served on FedEx, and ignore the fact that her charge was not filed until after this litigation had commenced. (Pl. memo, p. 4). Because it is undisputed that FedEx never received such documents prior to this litigation, there was never an opportunity to conciliate, and the Court rightly dismissed Plaintiffs' complaint as a result. Accordingly, the content of the affidavits and questionnaires is wholly impertinent to this matter.

> questionnaire and affidavit should not be considered the equivalent of a charge...

(Memoradum and order, p. 9). The Court clearly did not "overlook" any binding authority on this issue; rather, it simply did not interpret otherwise irrelevant cases in the unjustifiably broad manner in which Plaintiffs suggested it should. Plaintiffs' request for reconsideration is thus nothing more than an improper and thinly-veiled appeal of this Court's ruling, and should be denied by the Court. *Rmed Int'l, Inc. v. Sloan's Supermarkets, Inc.*, 207 F. Supp. 2d 292, 295 (S.D.N.Y. 2002).

FedEx reiterates that it does not dispute that intake questionnaires can in limited circumstances serve as charges, and that it does not challenge either the holding in *Edelman* or the validity of the EEOC regulation to which Plaintiffs devote a significant portion of their memo. (Pl. memo, pp. 4 - 7). Again, however, the EEOC regulation is unrelated to the single filing rule, and does not state that a confidential intake questionnaire can serve to place a charged party on notice of the claims against it for purposes of the single filing rule. Plaintiffs have not pointed to any decision - and FedEx is unaware of any - in which a Court has held that a confidential intake questionnaire can serve as the basis to allow non-charge filing plaintiffs to piggyback into subsequent litigation founded on claims contained in the questionnaire, but which the, defendant never had the opportunity to conciliate. If FedEx had moved to dismiss an individml lawsuit filed by either Robertson or Kennedy on the grounds that neither had filed an EEOC charge within 300 days after a discrete event, both would have valid arguments, provided their affidavits had been submitted to the EEOC within that 300-day time frame. Such was not the case here. Rather, FedEx moved to dismiss because neither Robertson's nor Kennedy's charge

could serve as the basis on which they or any other plaintiffs could maintain this collective action against FedEx.

Plaintiffs' focus on the *Freeman* charges is likewise misplaced. Plaintiffs again cite the language contained in affidavits and questionnaires that were never served on FedEx. (Pl. memo, p. 7). The Court correctly focused on the proper issue – the fact that none of the documents served on FedEx prior to litigation gave any indication that the grievance affected a group of individuals. (Order and memorandum, p. 11). Again, nothing was "overlooked" by the Court, as is required for the granting of a Rule 59(e) motion. Rather, Plaintiffs are simply unhappy with the Court's correct application of the law. Regardless of whether the Court distinguished an irrelevant Supreme Court decision by name, the Court's order is clear in its consideration and rejection of the arguments proffered by Plaintiffs.

2. Plaintiffs' continuing violation argument was not raised in its response to Defendant's motion.

Plaintiffs next argue that the fact that they alleged in their complaint that FedEx maintains a pattern or practice of age discrimination should allow charging parties to wait as long as six to eight years to file a charge of discrimination. However, this argument was not raised in response to Defendant's motion to dismiss, and is accordingly not appropriate for consideration in a motion to reconsider. On pages 5 and 6 of Defendant's original memorandum in support of its motion to dismiss, Defendant pointed out that the two charges which were filed prior to the time this litigation commenced (by Robertson and McQuillan) were not filed within 300 days of the allegedly discriminatory acts being challenged by Plaintiffs. Plaintiffs did not respond to this argument in their response to Defendant's motion to

dismiss. Rather, Plaintiffs claimed only that persons employed in the 300-day period prior to Patricia Kennedy's May 30, 2002 charge were entitled to participate in the action under a continuing violation theory. (Pl. memo in response to Defendant's motion to dismiss, p. 12). Because Plaintiffs did not originally respond with respect to either Robertson or McQuillan, Plaintiffs are precluded from raising the issue for the first time on a motion to reconsider. *Bank Leumi Trust Co. v. Istim, Inc.*, 902 F.Supp. 46, 48 (S.D.N.Y. 1995) (noting that local rule 6.3 precludes, a party from advancing new facts, issues or arguments not previously presented to the Court). In addition, the 300-day period prior to Kennedy's May 30, 2002 charge does not extend back to 1994. Accordingly, not only was Kennedy's charge late in that it was filed after this litigation, it was filed eight years after implementation of the policies she challenged.

The statement in Plaintiffs' memo that Robertson could not have filed a charge to challenge his termination on the date he was terminated highlights Plaintiffs' failure to grasp the issue in this case. (Pl. memo, p. 10). Robertson in fact did file a charge to challenge his termination on December 1, 2000 – well within 300 days of his being terminated. FedEx did not and does not challenge the timeliness of that charge alleging only individual discrimination against Robertson. Robertson was certainly entitled to sue FedEx for individual discrimination within 90 days of his receipt of the notice of right to sue issued on that charge – whatever that date may have been.[2] Robertson elected not to file such a suit. The fact

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[2] As set forth in Defendant's reply memorandum, there are no factual issues relating to when Robertson received his notice of right to sue. (Pl. memo, p. 10, fn. 3). Regardless of when he received the notice on his individual claims of discrimination, however, it is undisputed that Robertson has never filed a charge or

that Robertson filed an individual charge relating to his termination in 2000 does not entitle him – or anyone else – to file either a charge or a lawsuit challenging a policy implemented by FedEx six years earlier. Statutes of limitation exist for the precise reason of precluding such stale claims. Accordingly, he is not entitled to sue FedEx for class-wide age discrimination based on policies implemented by FedEx in 1994, and this Court correctly so held.

3. The Court correctly ruled that Tolliver v. Xerox mandates dismissal of this action.

In heading 3 of their Complaint, Plaintiffs insinuate that this Court did not follow *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990). (Pl. memo, p. 10). Plaintiffs of course ignore the primary reason that this Court prominently cited *Tolliver* – for the proposition that the charge served on the employer must contain some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim. (Memorandum and order, p. 7). Plaintiffs then attempt to infer that the Court only cited *Tolliver* to distinguish it from the instant litigation, once again ignoring the central issue in the case.[3] Plaintiffs further attempt to convince the Court that

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received a notice of right to sue alleging the claims he advances in this litigation.

[3] Plaintiffs' statement at the outset of section 3 of their memo is simply inaccurate. (Pl. memo, p. 10). This Court held under *Tolliver* that FedEx had not been placed on notice of the class-wide nature of the claims against it due to the lack of sufficient language in Plaintiffs' charges. (Memorandum and order, p. 7-8). Plaintiffs' statement that the Court only distinguished *Tolliver* from *Freeman* because the *Freeman* court never certified a class and because the

they were indeed members of the original *Freeman* litigation, despite the fact that this Court has already noted that *Freeman* had been dismissed at the time they sought to join. (Memorandum and order, p. 12). As part of this effort, Plaintiffs resort to an argument that qualifies as bizarre even in this litigation. They assert that a party should be entitled to amend a complaint under F.R.C.P. 15 after the complaint has already been dismissed, so long as the defendant did not file an answer prior to dismissal (ignoring the fact that the complaint was dismissed on defendant's motion). (Pl. memo, p. 11). If the Court indeed overlooked this argument, it was surely based on its desire not to waste judicial resources in addressing such an assertion. In short, the Court correctly applied *Tolliver* in holding that Plaintiffs cannot point to any charge sufficient to support piggybacking. Plaintiffs' attempt to select piecemeal portions of the Court's holding with which they disagree should therefore be disregarded.

Lastly, Plaintiffs argue without citation to any authority that they should be allowed discovery on the defense that the lawsuit is untimely. (Pl. memo, p. 12). Once again, this argument is presented for the first time in Plaintiffs' motion to reconsider, and was not raised in response to Defendant's motion to dismiss. Accordingly, it should not now be considered for the first time by the Court. *Bank Leumi Trust Co. v. Istim, Inc.*, 902 F.Supp. 46, 48 (S.D.N.Y. 1995).

Even if the Court were to consider Plaintiffs' argument, their assertion that Defendant has not conclusively proved their claims to be untimely is simply incorrect. Plaintiffs have not attacked any of the factual assertions made by Defendant; rather, they have asked the Court to apply unrelated legal

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additional plaintiffs did not timely join the *Freeman* litigation is therefore misleading at best.

precedent in an effort to support their case. Because the facts regarding the timeliness of the lawsuit are not in dispute, i.e. when charges were filed, when affidavits and intake questionnaires were filed and the content of the same, and when the various lawsuits were filed and dismissed, discovery is unwarranted. *See Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67 (2d Cir. 1998) (an affirmative defense may be raised by pre-answer motion to dismiss under Rule 12(b)(6) "without resort to summary judgment procedure if the defense appears on the face of the complaint); *Wujinn Nanxiashu Secant Factory v. Ti-Well Int'l*, 2002 U.S. Dist. LEXIS 9615 at *7 (S.D.N.Y. May 29, 2002) (copy attached) (parties are entitled to discovery if the defense is fact-sensitive).

CONCLUSION

Plaintiffs' motion is actually nothing more than an appeal of the Court's order in which Plaintiffs make "repetitive arguments on issues that have been considered fully by the Court." *Rmed Int'l*, 207 F. Supp. 2d at 296. Plaintiffs cannot point to any decisions or data that might reasonably be expected to alter the Court's conclusion. *Id.* Accordingly, this Court was correct to dismiss Plaintiffs' Complaint in its entirety, and Plaintiffs' Motionto Reconsider should be denied.

Dated: November 6, 2002

Respectfully submitted,

By:

/s/

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02-CV-3355

[Filed May 4, 2004]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Trompics, individually and on behalf of all others similarly situated, Plaintiff,	)
v.	)
Federal Express Corporation, Defendant.	)

MARGINAL ENTRY ORDER

Motion Denied. So Ordered.

/s/ Judge Lawrence M. McKenna
USDJ 5/4/04

NOTICE OF MOTION AND MOTION TO ALTER OR AMEND THE MEMORANDUM AND ORDER OF OCTOBER 9, 2002

PLEASE TAKE NOTICE THAT plaintiffs, by their attorneys, move under Rule 59(e), Fed. R. Civ. P., for an

order modifying and vacating the memorandum and order dated October 9, 2002, granting the defendant's motion to dismiss, and dismissing the Complaint, without leave to file an amended complaint or other pleading.

1. This motion is based upon the decision of the Supreme Court in *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (March 19, 2002), on remand, *Edelman v. Lynchburg College*, 300 F.3d 400 (4th Cir. 2002) and the regulations of the EEOC which define what kind of writing constitutes a charge of discrimination. 20 C.F.R. 1601.12(b)(Title VII reg); and 29 C.F.R. 29 C.F.R. 1626(b)(ADEA regs.).

Under the Supreme Court's decisions in *Edelman v. Lynchburg College, supra* and the lawful regulations of the EEOC, the questionnaire and affidavit of Patricia Kennedy was a charge in December, 2001, when received by the EEOC. Compare, Memo. and Order of Oct. 9, 2002 at pages 8-10. Under the lawful regulations, therefore, she filed her charge more than 60 days before filing of this suit. The ruling of this Court at pages 8-10 is therefore inconsistent with the *Edelman* decision, *supra*, and the valid EEOC regulation and should be vacated or altered.

2. This Court ruled in the Memo. and Order that the charges of Robertson and (perhaps) Kennedy were untimely, because they were not filed within 300 days of the commencement of the alleged unlawful discriminatory practices. Memo. at p. 8. However, the Complaint alleges that the age discriminatory practices of Federal Express that commenced in 1994, has followed those practices "each year" since that time, and that they "are the prevailing pattern or practice of Federal Express" and that "Federal Express has continued to follow that pattern or practice to the present..." and that "Unless restrained by order of this Court the

defendant will continue to pursue ...policies and practices alleged in the Complaint." Paras.23, 24 and 30. Each time an older worker is injured by an age discriminatory practice of Federal Express, that worker suffered a wrong "actionable under" the law "regardless of the fact that this pattern was begun" more than 180 or 300 days before the charge was filed *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986); *National Passenger R. Corp. v. Moragan*, ___ U.S. ___, 122 S. Ct. 2061, 2071 (2002).

3. The Second Circuit has ruled that the opt in procedure applies to actions by individuals as well as to class actions, and that individuals who did not file charges may prosecute another action under the single filing rule, if a charge of a non-party gave notice to EEOC of the employer-wide nature of the allegations. *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1055-1060 (2d Cir. 1990), *cert. den.* 499 U.S. 983. The district court attempted to distinguish that case on the ground that in that case there was a class certification and then a decertification, while in the *Freeman* case (at issue here) there was no class certification. Memo. at pp. 11-12.

However, the language of reasoning of the Second Circuit in *Tolliver*, *supra*, is incompatible with that distinction, for it expressly recognized that the "opt in" procedures specified in the ADEA are applicable in "individual suits" as well as in class actions, and they permit persons who did not file a charge to bring suit, so long as the EEOC was given notice by an earlier charge. *Tolliver*, *supra*, 918 F.2d at 1057. The district court erred in failing to apply the decision in *Tolliver* to the case at bar.

In any event the defendant has the burden on the affirmative defense of the untimeliness of a charge, and

plaintiffs should be allowed discovery before any such defense is acted upon by this court.

This motion is based upon the allegations of the Complaint, and the exhibits of record. A memorandum of points and authorities and a proposed Order are submitted herewith.

For the reasons set forth above, and set forth more fully in the memorandum of points and authorities in support of this motion, the motion should be granted, and the Court should enter an order of the kind submitted herewith.

Respectfully submitted,

/s/

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October 23, 2002

June 3, 2004

By Federal Express
James M. Parkinson, Clerk
United States District Court for the
Southern District of New York
500 Pearl Street
New York, N.Y. 10007-1312

Re: Holowecki et al. v. Federal Express Corporation
02-Cv-3355 (LMM)

Dear Sir:

Enclosed for filing in this case is a notice of plaintiffs' appeal from the Order of May 4, 2004 entered on May 5, 2004.

Please contact the undersigned if you have any problems or questions. Thank you for your cooperation

Sincerely,

/s/
David L. Rose
Attorney for plaintiffs

Enclosures

cc: Carl Morrison, Esq. (by Fed. Ex.)

UNITED STATES DISTRICT COURT
Southern District of New York

02-CV-3355 (LMM)

[Filed June 4, 2004]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Trompics, individually and on behalf of all others similarly situated, Plaintiff,	)
v.	)
Federal Express Corporation, Defendant.	)

NOTICE OF APPEAL

Plaintiffs by their attorneys appeal to the U.S. Court of Appeals for the Second Circuit from the Order signed by this Court on May 4, 2004 and entered on May 5, 2004, Docket No. 24, and all prior rulings and any final order or judgment which has been or may be entered based on that Order.

/s/

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Attorneys for Plaintiffs

TITLE 29. LABOR
CHAPTER 14. AGE DISCRIMINATION IN EMPLOYMENT

29 U.S.C. § 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

* * *

29 U.S.C. § 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations. The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion. The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be

unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion. No civil action may

be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice. Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 U.S.C. § 633. Federal-State relationship

(a) Federal action superseding State action. Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon

commencement of action under this Act such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings. In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER XIV -- EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1626 -- PROCEDURES -- AGE DISCRIMINATION IN EMPLOYMENT ACT

29 C.F.R. § 1626.1 Purpose.

The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity

Commission for carrying out its responsibilities in the administration and enforcement of the Age Discrimination in Employment Act of 1967, as amended.

29 C.F.R. § 1626.3 Other definitions.

For purpose of this part, the term the Act shall mean the Age Discrimination in Employment Act of 1967, as amended; the Commission shall mean the Equal Employment Opportunity Commission or any of its designated representatives; charge shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act; complaint shall mean information received from any source, that is not a charge, which alleges that a named prospective defendant has engaged in or is about to engage in actions in violation of the Act; charging party means the person filing a charge; complainant means the person filing a complaint; and respondent means the person named as a prospective defendant in a charge or complaint, or as a result of a Commission-initiated investigation.

29 C.F.R. § 1626.6 Form of charge.

A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing.

29 C.F.R. § 1626.8 Contents of charge; amendment of charge.

(a) In addition to the requirements of § 1626.6, each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge;

(2) The full name and address of the person against whom the charge is made;

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;

(4) If known, the approximate number of employees of the prospective defendant employer or members of the prospective defendant labor organization.

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of § 1626.6.

(c) A charge may be amended to clarify or amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not again be referred to the appropriate State agency.

29 C.F.R. § 1626.11 Notice of charge.

Upon receipt of a charge, the Commission shall promptly notify the respondent that a charge has been filed.

29 C.F.R. § 1626.12 Conciliation efforts pursuant to section 7(d) of the Act.

Upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion. Upon failure of such conciliation the Commission will notify the charging party. Such notification enables the charging party or any person aggrieved by the subject matter of the charge to commence action to enforce their rights without waiting for the lapse of 60 days. Notification under this section is not a Notice of Dismissal or Termination under § 1626.17.

No. 06-1322

FILED
AUG 9 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

PAUL HOLOWECKI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the Second Circuit erred in concluding that the prerequisites to suit in § 626(d) of the Age Discrimination in Employment Act of 1967 ("ADEA") were satisfied by the submission of an "intake questionnaire" to the Equal Employment Opportunity Commission ("EEOC"), where the EEOC did not treat the form as a charge by providing notice to the employer or attempting voluntary conciliation, and in the absence of any evidence that the employee submitting the questionnaire reasonably believed it would be treated as a charge.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit. The Petitioner here and defendant-appellee below is Federal Express Corporation (d/b/a/ FedEx Express) ("FedEx"). The Respondents here, who were also plaintiffs-appellants below, are Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Steven Almendarez, Kelly J. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Trompics.[1] Additional plaintiffs-appellants below, who have been voluntarily dismissed from the case and therefore are not Respondents here, are Andy Kubicki, Frank J. Martinez, and Elizabeth Tucker. By virtue of the allegations of their Complaint in the District Court, the Respondents seek to represent a putative class of persons similarly situated, but no motion for class certification has yet been filed and no class has been certified. *See* SUP. CT. R. 24.1(b).

The corporate disclosure statement contained in the Petition for Writ of Certiorari, Pet. iii, remains accurate. *See* SUP. CT. R. 24.1(b), 29.6.

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[1] Respondent Nancy Trompics was incorrectly identified in the complaint as Nancy Thompics. Although the district court amended the caption of the case to reflect the correct name, *see* Pet. App. 32a at n.1, the incorrect spelling has continued to appear at times in this case.

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113 Cong. Rec. H34740 (daily ed. Dec. 4, 1967) (remarks of Rep. Perkins) 14, 15

113 Cong. Rec. H34742 (daily ed. Dec. 4, 1967) (remarks of Rep. Perkins) 14

113 Cong. Rec. H34745 (daily ed. Dec. 4, 1967) (remarks of Rep. Eilberg) 20

113 Cong. Rec. H34745 (daily ed. Dec. 4, 1967) (remarks of Rep. Reid) 14

113 Cong. Rec. H34745 (daily ed. Dec. 4, 1967) (remarks of Rep. Eilberg) 14, 20

113 Cong. Rec. H34746 (daily ed. Dec. 4, 1967) (remarks of Rep. Daniels) 13

113 Cong. Rec. S31254 (daily ed. Nov. 6, 1967) (remarks of Sen. Javits) 13

113 Cong. Rec. S7076 (daily ed. Mar. 16, 1967) (remarks of Sen. Javits) 16

123 Cong. Rec. S34317 (daily ed. Oct. 19, 1977) (remarks of Sen. Domenici) 14

CP Enclosure with EEOC Form 5 (May 2001) 4

EEOC Form 283 ..... *passim*

EEOC Form 5 ..... *passim*

Howard Eglit, The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark, 39 Wayne L. Rev. 1093 (1993) .. 18

Richard A. Bales, Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements, 47 Baylor L. Rev. 591 (1995) . 16

S. Rep. 90-723 (1967) 15

U.S. Equal Employment Opportunity Comm'n, Charge Statistics FY 1997 through FY 2006, http://www.eeoc.gov/stats/charges.html (last visited August 7, 2007) 22

U.S. Equal Employment Opportunity Comm'n, Age Discrimination in Employment Act (ADEA) Charges FY 1997-FY 2006, http://www.eeoc.gov/stats/adea.html (last visited August 7, 2007) 16

U.S. Equal Employment Opportunity Comm'n, Definitions of Terms, http://www.eeoc.gov/stats/define.html (last visited August 7, 2007) 16

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, Pet. App. 3a–23a, is reported at 440 F.3d 558. The unpublished memorandum and order of the United States District Court for the Southern District of New York, Pet. App. 31a–42a, is unofficially reported at 2002 WL 31260266 and 2002 U.S. Dist. LEXIS 19100.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Second Circuit issued its opinion on March 8, 2006, Pet. App. 3a, and entered its order denying rehearing and rehearing en banc on October 31, 2006, Pet. App. 1a. On January 19, 2007, FedEx applied to extend the time to file a petition for certiorari. Justice Ginsburg granted that application on January 23, 2007, extending the time to file to March 30, 2007. FedEx timely filed its petition on March 30. This Court granted the petition on June 4, 2007. 127 S. Ct. 2914. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* The most pertinent provision of the ADEA, 29 U.S.C. § 626(d), provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

> (1) within 180 days after the alleged unlawful practice occurred; or
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Other relevant provisions of the ADEA are reproduced at Joint Appendix ("JA") 344–50.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

The ADEA makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). It permits an individual who has been discriminated against in violation of the ADEA to bring a civil action, *id.* § 626(c)(1), but only if a number of prerequisites are met first, *id.* § 626(d). A "charge alleging unlawful discrimination" must be filed within either 180 or 300 days after the alleged discrimination occurred, depending on the jurisdiction; the charging party must wait 60 days after filing the charge; and the EEOC must promptly notify the persons

named in the charge as potential defendants and seek voluntary resolution of the claims. *Id.* § 626(d).

Because the filing of a charge is mandatory under § 626(d), a plaintiff is barred from bringing an ADEA suit where no charge alleging age discrimination has been filed. *See, e.g., Mehr v. Starwood Hotels & Resorts Worldwide, Inc.*, 72 Fed. Appx. 276, 286 (6th Cir. 2003) ("The filing of a discrimination charge with the EEOC is a jurisdictional prerequisite to bringing a civil action [under the ADEA].") (citing *Davis v. Sodexho Cumberland Coll. Cafeteria*, 157 F.3d 460, 463 (6th Cir. 1998)). The relevant time periods for filing a charge are likewise mandatory, and a plaintiff is barred from bringing an ADEA suit where her charge alleging age discrimination was filed untimely. *See, e.g., Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 835 (8th Cir. 2002) (affirming dismissal of ADEA claims as time-barred because charge was not filed within 300 days of alleged discrimination).

The EEOC's statutory duties under § 626(d) are equally mandatory. Just as the charge alleging unlawful discrimination must be filed within either 180 or 300 days, the EEOC must promptly provide notice of the allegations of discrimination to the employer and initiate efforts at resolving the dispute informally. *Compare* 29 U.S.C. § 626(d) ("Such a charge *shall* be filed" within either 180 or 300 days) (emphasis added) *with id.* ("The Commission *shall* promptly notify all persons named in such charge as prospective defendants in the action and *shall* promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.") (emphasis added).

The EEOC has established interpreting regulations specifying both the form and the content needed to allege

unlawful discrimination. 29 C.F.R. §§ 1626.6, 1626.8. Other EEOC regulations reflect the statute's requirement that the EEOC provide prompt notice to the employer and promptly initiate conciliation efforts upon receiving a charge. *See id.* § 1626.11 ("Upon receipt of a charge, the Commission shall promptly notify the respondent that a charge has been filed."); *id.* § 1626.12 ("Upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.").

The EEOC has promulgated a form, EEOC Form 5, on which to take ADEA charges. 1 EEOC Compliance Manual § 2.5(a), Drafting the Charge/Complaint (Oct. 2002) ("Use Form 5 to take Title VII, ADA, ADEA or concurrent charges."). The form is entitled "Charge of Discrimination." *Id.*; *see also* JA 275. The standard Privacy Act statement designed to accompany Form 5 states that the form is used to "guide [the EEOC's] mediation and investigation efforts and, as applicable, to determine, conciliate, and litigate claims of unlawful discrimination." *See* CP Enclosure with EEOC Form 5 (May 2001). It also informs charging parties that "[a] copy of th[eir] charge will ordinarily be sent to the respondent organization against which the charge is made." *Id.*

A different form, EEOC Form 283, may be used before a charge is filed to gather information about potential charges of discrimination. Form 283, designated an "intake questionnaire," expressly indicates that its "Routine Uses" are determining whether the EEOC has jurisdiction over "potential charges" and providing "pre-charge filing counseling." *See* JA 265; Pet. App. 53a. Unlike the Form 5 charge form, the Form 283 intake questionnaire does not advise that it will be sent to the employer or used for conciliation efforts. *See* JA 265; Pet. App. 53a.

II. FACTUAL BACKGROUND.

In December 2001, respondent Patricia Kennedy submitted to the EEOC an intake questionnaire, EEOC Form 283, and a five-page typed affidavit, both of which she had signed on December 3, 2001, and in which she provided information about allegations of age discrimination by her employer, FedEx. JA 265-74. The intake questionnaire did not include any indication that it constituted a charge of discrimination for purposes of the ADEA. To the contrary, as noted above, the Form 283 specified that it was not a charge by stating that its "Routine Uses" were consideration of "*potential* charges" and providing "*pre-charge filing* counseling." JA 265 (emphasis added). Nor did the EEOC treat Kennedy's intake questionnaire as a charge: the EEOC did not assign it a charge number, did not notify FedEx about it, and did not commence an investigation or conciliation efforts based on it—all steps the EEOC is required to take if it receives a charge. *See* 29 U.S.C. § 626(d); 29 C.F.R. §§ 1626.11, 1626.12.[2]

On April 30, 2002, Kennedy and thirteen other current and former FedEx employees initiated this lawsuit in the United States District Court for the Southern District of New York, alleging that FedEx had implemented policies in 1994 and 1995 that violated the ADEA. JA 19-35. The complaint did not allege that Kennedy or any of the thirteen other plaintiffs had filed a charge of discrimination or that the December 2001 intake questionnaire completed by Kennedy constituted a charge. JA 19-35.

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[2] For reasons unknown, Kennedy re-signed and re-dated the intake questionnaire on February 3, 2002. *See* JA 265.

Kennedy finally filed a charge of discrimination with the EEOC on May 30, 2002—one month after she had filed this lawsuit—using the EEOC's charge document, Form 5. JA 275.[3] It is undisputed that the May 30, 2002 charge was not timely under § 626(d). The ADEA requires that a charge be filed at least 60 days *before* litigation is commenced, in order to give the EEOC time to notify the employer of the employee's allegations and seek voluntary conciliation between the parties before a lawsuit is filed. *See* 29 U.S.C. § 626(d). But Kennedy filed her charge only *after* she filed suit, in clear contravention of the statutory requirements.

III. LOWER COURT PROCEEDINGS.

Shortly after the plaintiffs filed their complaint, FedEx moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), on the grounds that none of the fourteen named plaintiffs had satisfied the statutory prerequisites to filing an ADEA action. JA 40–58.

Because the charge filed by Kennedy one month after the filing of her lawsuit was clearly untimely, the plaintiffs did not assert that it satisfied § 626(d)'s prerequisites. JA 180–92. Instead, the plaintiffs argued that Kennedy's intake questionnaire and accompanying affidavit satisfied the requirements of § 626(d), JA 190–91, even though the EEOC

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[3] Unlike Kennedy's intake questionnaire, the filing of this charge triggered the EEOC's investigative machinery: the EEOC assigned the charge a number, gave FedEx notice of it on July 9, 2002, and sought information from FedEx for its investigation of the allegations. The EEOC closed its investigation of Kennedy's charge on November 13, 2002, because "Charging Party has filed a lawsuit . . . on the same basis and issues in a court of competent jurisdiction."

had not treated the intake questionnaire as a charge by serving it on FedEx or initiating conciliation proceedings, and even though Kennedy had subsequently filed an actual charge with the EEOC, *see* JA 275. The plaintiffs neither pleaded nor presented evidence that Kennedy believed that the intake questionnaire she submitted would be treated as or otherwise constituted a charge. JA 180–277. They neither pleaded nor submitted proof that the EEOC advised Kennedy that the intake questionnaire sufficed as a charge or otherwise misled her with regard to the effect of the intake questionnaire. JA 180–277. In fact, the plaintiffs failed to plead or submit any proof that Kennedy ever discussed the intake questionnaire with any EEOC representative. JA 180–277.

The district court granted FedEx's motion to dismiss on the ground that the § 626(d) prerequisites to suit had not been satisfied. *See* Pet. App. 31a–42a. The district court held that Kennedy "failed to meet the requirement of Section 626(d)" because her charge was untimely filed "on May 30, 2002, one month after the complaint in this case was filed." *Id.* at 38a–39a. The district court rejected the plaintiffs' argument that Kennedy's submission of the intake questionnaire in December 2001 satisfied § 626(d) and, as a result, also rejected their argument that eleven other plaintiffs who had not filed their own charges could "piggyback" on Kennedy's intake questionnaire in fulfillment of their own obligations under § 626(d). *Id.*

The Second Circuit reversed in relevant part, holding that Kennedy's intake questionnaire constituted a "charge" that satisfied the requirements of § 626(d). *See* Pet. App. 4a–5a, 17a–20a. According to the Second Circuit, the intake questionnaire could be deemed a "charge" despite the fact that it was not actually treated as a charge by the EEOC, which neither notified FedEx of its filing nor commenced the

conciliation efforts required of it under § 626(d). *Id.* at 5a. What mattered, the Second Circuit held, was not whether Kennedy's filing functioned as a "charge" under § 626(d), triggering notice, investigation, and conciliation by the EEOC. *Id.* at 16a–17a. Such a rule, the court reasoned, would unfairly "establish a prerequisite to suit beyond a prospective plaintiff's control." *Id.* at 17a. Instead, what mattered to the Second Circuit was Kennedy's "manifest intent" in submitting her intake questionnaire to the EEOC. *Id.* at 15a. Applying this "manifest intent" test, the Second Circuit concluded that Kennedy's intake questionnaire constituted the charge required by § 626(d) because it contained the essential information required by EEOC regulations to be included in a charge and, through its "forceful tone and content," communicated Kennedy's "intent to activate the EEOC's administrative process"—even though this "forceful" tone, content, and intent were not communicated to FedEx. *Id.* at 17a–20a.

Finally, the Second Circuit concluded that because Kennedy's intake questionnaire satisfied the "charge" requirement of § 626(d), eleven of the other named plaintiffs could "piggyback" on that intake questionnaire without themselves having met any of the pre-suit requirements of the statute. *Id.* at 20a–21a.

FedEx timely petitioned for rehearing or rehearing *en banc*, but the Second Circuit denied that request on October 31, 2006. *See* Pet. App. 1a–2a.

This Court granted FedEx's petition for certiorari on June 4, 2007. *Federal Express Corp. v. Holowecki*, 127 S. Ct. 2914 (2007).

SUMMARY OF THE ARGUMENT

Section 626(d) of the ADEA sets forth a number of requirements that must be satisfied before a party complaining of age discrimination may sue her employer. These include, among other things, prompt EEOC notification to the employer of any charge of age discrimination against it and prompt efforts by the EEOC to eliminate the unlawful practices alleged in the charge by informal methods of conciliation, conference, and persuasion in lieu of litigation. The statute requires dismissal of any lawsuit in which these conditions have not been satisfied.

In this case, allowing Kennedy's intake questionnaire to constitute a charge permits her suit to proceed even though FedEx received no notice of that questionnaire until it was attached to the plaintiffs' opposition to FedEx's motion to dismiss and FedEx was given no opportunity to resolve Kennedy's claims prior to litigation. Permitting an ADEA suit to proceed under these circumstances is inconsistent with both the text of the ADEA and the plain intent of Congress that informal methods be undertaken to address alleged discrimination before litigation. Indeed, permitting litigation to proceed without satisfaction of the statute's requirements leads to unacceptable consequences that Congress sought to prevent and this Court should not tolerate. These consequences include increased litigation with its attendant expense and the burdens it places on litigants and the courts; more frequent pursuit of stale claims based on problems that might have been corrected with notice to the employer; and prejudice to employers attempting to defend against such claims long after records are likely to be maintained and witness recollections are likely to be fresh.

Nothing about this case warrants departing from the statutory framework that Congress set forth in the ADEA. Where, as here, Congress has struck a careful balance between vindicating employee rights and protecting the needs of employers, courts have no license to recalibrate that balance because they perceive it as somehow "unfair." Even if courts could make exceptions to the requirements of § 626(d) to avoid manifest unfairness, no such exception would be called for here. There is nothing to suggest that Kennedy would have been treated unfairly had the statutory requirements been properly enforced in her case. There is no submission of evidence—nor even an allegation—that Kennedy had any reason to believe that she had filed a charge when her intake questionnaire was submitted.

Finally, the test that the Second Circuit applied to alleviate any perceived unfairness to Kennedy is particularly problematic. It invites mischief and creates a mechanism for bypassing the statute and the EEOC. Under a test purporting to find "intent" to activate the administrative process through the "tone and content" of an intake questionnaire, the opportunistic may customize their intake questionnaires with a forceful "tone and content" yet intend only to litigate as soon as possible and never to activate the administrative process. In addition, whether any particular submission exhibits a sufficient "tone and content" is an entirely subjective determination likely to lead to different outcomes in cases involving substantially similar facts and providing no meaningful guidance to any of the affected parties. A "tone and content" test sacrifices the goals of the statute for the sake of the court's vision of "fairness." Indeed, the plaintiffs focused attention on the tone and content of Kennedy's intake questionnaire only to distract the courts from the untimeliness of the charge that she ultimately filed and the lack of informal resolution efforts in this case.

ARGUMENT

An intake questionnaire that is not treated as a charge by the EEOC—that does not trigger notice and conciliation efforts by the agency—can never constitute the "charge" that must be filed under the ADEA. The statutory scheme makes clear that to constitute a "charge," an intake questionnaire must allege unlawful discrimination and activate the EEOC's mandatory duties of providing notice and initiating conciliation. An intake questionnaire that does not yield notice and attempts at informal resolution cannot be a "charge." Application of this straightforward rule in this case is required by the plain language of § 626(d), is consistent with Congress' evident intent in enacting that provision, and results in no unfairness.

I. A "CHARGE" WITHIN THE MEANING OF § 626(d) IS A DOCUMENT THAT RESULTS IN NOTICE AND AN OPPORTUNITY FOR CONCILIATION.

The plain text of § 626(d) makes clear that a "charge" is a document that triggers the EEOC's mandatory duties of providing notice and initiating conciliation.[4] That reading is affirmed by both the legislative history of the ADEA and sound public policy considerations.

A. The ADEA defines a "charge" by what it does.

Section 626(d), which requires a "charge" to be filed before an ADEA lawsuit may be initiated, also straightforwardly defines "charge." A "charge" alleges

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[4] Unlike an intake questionnaire, this is precisely the design and function of a Form 5 "Charge of Discrimination."

unlawful discrimination and initiates the EEOC's notice and conciliation process based on the allegations it contains. 29 U.S.C. § 626(d). If the EEOC receives a charge, it *must* "promptly notify all persons named in such charge as prospective defendants in the action and . . . promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." *Id.* Thus, a document that triggers the EEOC's mandatory statutory duties is a charge for purposes of § 626(d); a document that does not is not.

In light of § 626(d)'s plain, functional definition of a "charge," the Second Circuit erred in holding that Kennedy's intake questionnaire constituted a charge. Kennedy's intake questionnaire undisputedly failed to activate the EEOC's investigatory machinery. The EEOC did not assign the questionnaire a charge number. It did not notify FedEx of Kennedy's allegations. And it did not commence an investigation or efforts to resolve Kennedy's claims informally. As such, Kennedy's intake questionnaire plainly failed to meet § 626(d)'s definition of a "charge."

B. Congress intended employers to have notice of discrimination allegations and an opportunity to conciliate claims before facing suit under the ADEA.

As demonstrated above, the text of the ADEA clearly defines "charge" as a document that initiates the EEOC's notice and conciliation process. Because the text of the statute is plain, no further analysis is required in this case. *See, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1549 (2007) ("[W]hen the intent of Congress is clear from the statutory text, that is the end of the matter.") (marks omitted). Even if there were any doubt on this score,

however, it would be resolved by the manifest congressional purpose behind § 626(d), which is to facilitate and require notice and conciliation. Because this Court's "obligation is to give effect to congressional purpose so long as the congressional language does not itself bar that result," *Johnson v. United States*, 529 U.S. 694, 710 n.10 (2000), it should therefore hold that the prerequisites of § 626(d) are not satisfied by an intake questionnaire that has not resulted in notice and the initiation of conciliation proceedings.

The ADEA reflects Congress' careful balance between the need of employees to have an effective remedy for age discrimination and the competing need of employers to have an opportunity to resolve employee issues without ligitation. *See* 113 Cong. Rec. S31254 (daily ed. Nov. 6, 1967) (remarks of Sen. Javits), *reprinted in* U.S. Equal Employment Opportunity Comm'n, Legislative History of the Age Discrimination in Employment Act (1981) (hereinafter "Legislative History of the ADEA"), Doc. No. 20 at 145 ("We now have the enforcement plan which I think is best adapted to carry out this age-discrimination-in-employment ban with the least overanxiety or difficulty on the part of American business, and with complete fairness to the workers."); 113 Cong. Rec. H34746 (daily ed. Dec. 4, 1967) (remarks of Rep. Daniels), *reprinted in* Legislative History of the ADEA, Doc. No. 21 at 157 ("The point should be made, however, that the bill takes into full consideration the problems and interests of employers . . . . It recognizes the needs of both employees and employers.").

Congress recognized that a private lawsuit is often a less-than-ideal way to address alleged age discrimination for everyone involved—the employee, the employer, and the courts. Instead, "the prompt resolution of employment discrimination allegations through voluntary conciliation and

cooperation," *Ledbetter v. White*, 127 S. Ct. 2162, 2170–71 (2007), is vastly preferable. *See* 113 Cong. Rec. H34745 (daily ed. Dec. 4, 1967) (remarks of Rep. Reid), *reprinted in* Legislative History of the ADEA, Doc. 21 at 156 ("Rather than utilizing enforcement procedures patterned after the National Labor Relations Act, H.R. 13045 adopted the recommendation of our bill to follow essentially the well-tested compliance mechanisms of the Fair Labor Standards Act. This approach emphasizes conciliation[,] conference and persuasion . . . ."); 113 Cong. Rec. H34742 (daily ed. Dec. 4, 1967) (remarks of Rep. Perkins), *reprinted in* Legislative History of the ADEA, Doc. No. 21 at 153 (noting with favor that, under Wisconsin's age discrimination law, "[a]lmost all cases have been settled by conciliation"); *see also* 123 Cong. Rec. S34317 (daily ed. Oct. 19, 1977) (remarks of Sen. Domenici), *reprinted in* Legislative History of the ADEA, Doc. 47 at 504 ("[I]t is desirable for all concerned—the employees, the employers, and the [EEOC] to resolve as many cases as possible by means of voluntary compliance."). Congress also recognized the importance of giving an employer notice of allegations of age discrimination before a lawsuit is brought, both to aid voluntary conciliation efforts and as a matter of fairness to the employer. *See* 29 U.S.C. § 626(d) (providing for such notice to employers).

Congress balanced these competing considerations—an employer's need for notice of the allegations against it and the preference for voluntary conciliation versus an aggrieved employee's need for a vehicle to obtain relief—by designing the ADEA to require that notice will be given to employers and informal resolution will be sought before litigation is instituted. Thus, under the ADEA, "[t]he employee as well as the [EEOC] may bring violators to court but the [EEOC] *must first attempt to procure voluntary compliance before either [the EEOC] or the employee files a civil action.*" 113

Cong. Rec. H34740 (daily ed. Dec. 4, 1967) (remarks of Rep. Perkins) (emphasis added), *reprinted in* Legislative History of the ADEA, Doc. 21 at 151; *see also* S. Rep. 90-723, at 10 (1967), *reprinted in* Legislative History of the ADEA, Doc. 18 at 114 ("During the 60-day period, the [EEOC] *must* seek to eliminate unlawful practices by informal methods of conciliation.") (emphasis added).

Congress' intent, as demonstrated in this legislative history, together with the functional design of the statute, make manifest the requirement that notice and conciliation attempts occur prior to the filing of an ADEA lawsuit. Congress' intent is thwarted where, as in this case, an employee is permitted to bring suit even though she has not filed a timely charge with the EEOC, her employer has not received pre-suit notice of her allegations, and there have been no efforts at resolving her claims without resort to litigation. Therefore, to give effect to the congressional purpose for the statute, this Court must hold that § 626(d)'s prerequisites to bringing an ADEA lawsuit are not satisfied by the submission of an intake questionnaire that has not triggered the EEOC's mandatory duties of giving notice to the employer and initiating voluntary reconciliation efforts.

C. Sound policy requires notice and conciliation to occur before suit is brought under the ADEA.

The requirement that notice and conciliation occur before an ADEA lawsuit is filed—and the resulting conclusion that an intake questionnaire that is not treated as a charge by the EEOC is not a charge—reflects sound public policy. A contrary conclusion would lead to numerous unpalatable consequences that Congress did not intend.

1. Increased Litigation.

Allowing intake questionnaires to satisfy § 626(d) even where conciliation efforts have not occurred would lead to increased, perhaps unnecessary, litigation. If efforts by the EEOC to "eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion" do not take place, more claims of age discrimination will result in lawsuits. The EEOC reports that it has successfully conciliated between 74 and 409 ADEA charges each year since 1997 in addition to the charges that were "resolved through negotiated settlements, withdrawals with benefits, and other types of resolutions." *See* U.S. Equal Employment Opportunity Comm'n, Age Discrimination in Employment Act (ADEA) Charges FY 1997-FY 2006, http://www.eeoc.gov/stats/adea.html (last visited August 7, 2007); U.S. Equal Employment Opportunity Comm'n, Definitions of Terms, http://www.eeoc.gov/stats/define.html (last visited August 7, 2007). Without the EEOC's intervention, many of these informally-resolved claims undoubtedly would have resulted in lawsuits.

Resolution of ADEA claims through litigation rather than conciliation is bad for employees, who are forced to wait longer for their allegations to be resolved and to incur the expense and stress of suing their employer. *See* 113 Cong. Rec. S7076 (daily ed. Mar. 16, 1967) (remarks of Sen. Javits), *reprinted in* Legislative History of the ADEA, Doc. 15 at 71 (lengthy proceedings are particularly prejudicial to the rights "of older citizens to whom, by definition, relatively few productive years are left"); Richard A. Bales, Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements, 47 Baylor L. Rev. 591, 593 (1995) ("Judges see the employment litigation explosion adding to the backlog that

forces litigants to wait for years before getting to trial . . . .").

Unnecessary litigation harms employers, who face the distractions and expenses of defending themselves against allegations of discrimination in court. Employers are significantly penalized if they are deprived of the opportunity to resolve claims without litigation because, once suit is filed, they incur attorneys' fees and additional costs of litigation—including potentially irreversible harm to their reputation—and they may become liable for the employee's attorneys' fees as well. *See Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 1001 (10th Cir. 2005) ("Attorney fees may be awarded to the prevailing party in age-discrimination cases through the ADEA's incorporation of remedies available under the Fair Labor Standards Act.").

Increased litigation of ADEA claims also burdens courts, which have to devote more of their limited resources to resolving these disputes. *See United States v. Dieter*, 429 U.S. 6, 8 (1976) (noting that the Court must be "wary of imposing added and unnecessary burdens on the courts of appeals"); *Emerald Investors Trust v. Gaunt Parsippany Partners*, Nos. 05-3706, 05-4134, __ F.3d __, 2007 WL 1695342, at *10 (3d Cir. June 13, 2007) (noting the "burdens on the federal courts" caused by the "massive increase in the quantity of litigation in the federal courts for the last 30 years, far outpacing the growth in the size of the federal judiciary").

Congress expressly required the EEOC to attempt conciliation between the parties, evidencing a clear public policy of avoiding the costs and burdens of litigation where possible. "The advantages of resorting in the first instance to a procedure whereby disputes may be resolved by conference, conciliation, and persuasion are evident: an unrepresented

claimant may seek and sometimes be awarded relief; the parties may informally resolve their differences without the bitterness engendered by litigation; and the courts are spared the additional burden of yet more lawsuits." *Davis v. U.S. Steel Supply*, 688 F.2d 166, 193 (3d Cir. 1982) (Sloviter, J., dissenting). This Court should enforce the clear language of § 626(d) to achieve these effects.

2. Stale claims.

Permitting § 626(d) to be satisfied by an intake questionnaire where notice and conciliation efforts have not taken place would increase not only the number of ADEA lawsuits but also the likelihood that the claims alleged in those lawsuits will be stale.

An employee is required to bring suit under the ADEA within ninety days of receiving notice that the EEOC proceedings involving her claims have been dismissed or terminated. *See* 29 U.S.C. § 626(e). If the EEOC delays in issuing a notice of dismissal, however, the employee may delay in bringing her suit. *See* Howard Eglit, The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark, 39 Wayne L. Rev. 1093, 1108 (1993) (under the ADEA as amended, "a notice issued long after the alleged discrimination occurred and after the filing of a charge of unlawful discrimination—years even—will only then start the 90-day 'meter' running. And so long as the suit is filed within that 90 days, the plaintiff will be deemed to have timely commenced his or her litigation."). If the EEOC never issues a notice of dismissal, the ninety-day "meter" never starts running and the employee can wait indefinitely—even

five, ten or twenty years or more after the claims arose—to bring suit.[5]

The problem of stale claims is exacerbated if an employee is allowed to bring suit after submitting an intake questionnaire where no notice has been given to the employer and no attempts at voluntary conciliation have been made. Such a rule increases the likelihood of stale claims being litigated because if the EEOC has not provided notice and initiated conciliation attempts, it has no reason to issue a notice of dismissal. Allowing suits to be brought based on intake questionnaires that have not been treated as charges will result in more suits being brought where no notice of dismissal has issued, and those suits are more likely to be stale because there is no time limit within which they must be brought.

Stale suits prejudice employers because "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened." *Ledbetter v. White*, 127 S. Ct. 2162, 2171; *see also id.* at 2170 (congressionally-established deadlines for filing charges of discrimination are intended to "protect[] employers from the burden of defending claims arising from employment decisions that are long past."). Witnesses may be unavailable because they have moved, or died, or for a variety of other

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[5] Unlike in the Title VII and the Americans with Disabilities Act contexts, receipt of a notice of dismissal is not a condition precedent to bringing suit under the ADEA. *Compare* 29 U.S.C. § 626(d), (e) (ADEA) *with* 42 U.S.C. § 2000e-5(f)(1) (Title VII) *and* 42 U.S.C. § 12117(a) (ADA); *see also Julian v. City of Houston*, 314 F.3d 721, 725 & n.8 (5th Cir. 2002). Thus, the lack of a letter of dismissal does not prevent an employee from suing under the ADEA, but instead exempts her from any time limit on doing so.

reasons. Even those witnesses who can be found will have diminished recollections. *See id.* ("[E]vidence relating to intent may fade quickly with time."); *Smith v. Hooey*, 393 U.S. 374, 380 (1969) (noting the "erosive effects of the passage of time": "evidence and witnesses disappear, memories fade, and events lose their perspective"). And the pertinent employment records may be difficult to locate or even non-existent, perhaps because the employer, having never received notice of the employee's allegations, destroyed them under a reasonable records retention policy. *See* 29 C.F.R. § 1627.3 (employers must keep payroll or other employee records for only three years unless they receive notice that an enforcement action is commenced, in which case they are required to keep the pertinent records until the final disposition of the action).

Moreover, stale suits not preceded by notice and EEOC action deprive employers of the opportunity to detect and correct potentially discriminatory employment practices in a timely and efficient manner, thus undercutting the ADEA's primary goal of preventing unlawful discrimination. *See* 113 Cong. Rec. H34745 (daily ed. Dec. 4, 1967) (remarks of Rep. Eilberg), *reprinted in* Legislative History of the ADEA, Doc. 21 at 156 ("[T]he bill contains very real and effective tools with which to launch new educational and persuasive programs designed to eradicate discriminatory practices in employment. And, where these tools fail, the bill provides machinery to enable governments and agencies to *prevent* practices which cannot be otherwise overturned.") (emphasis added); *Zinger v. Blanchette*, 549 F.2d 901, 905 (3d Cir. 1977) ("The primary purpose of the [ADEA] is to *prevent* age

discrimination in hiring and discharging workers.") (emphasis added).[6] Congress did not intend these undesirable results.

On the other hand, requiring the EEOC to treat a document as a charge in order for that document to be deemed a "charge" under § 626(d) encourages the EEOC to initiate proceedings and issue prompt notices of dismissal, as required by the statute. The ninety-day limitation on suing, which runs from the date of the notice of dismissal, prevents the litigation of stale age discrimination claims and ensures that employers are not blindsided with stale claims of which they never received any notice.

3. Effect on the EEOC.

Finally, allowing intake questionnaires to suffice as charges under § 626(d) will either: (1) force the EEOC to dramatically increase its workload; or (2) allow plaintiffs to unilaterally bypass the important statutory obligations Congress has assigned to the EEOC. Congress did not intend either of these outcomes.

Because the EEOC did not intend the Form 283 intake questionnaire to function as a charge, the EEOC does not generally treat intake questionnaires as charges. *See Bost v. Federal Express Corp.*, 372 F.3d 1233, 1240–41 (11th Cir. 2004) (EEOC did not give employer notice of intake questionnaire and did not initiate investigation or conciliation efforts); *Diez v. Minn. Mining & Mfg. Co.*, 88 F.3d 672, 674

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[6] This particular effect could be mitigated somewhat if the EEOC were required to at least provide the prompt notice to employers that § 626(d) requires, but is better avoided if the EEOC also acts quickly to process allegations toward informal resolution.

(8th Cir. 1996) (same); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1137 (7th Cir. 1994) (same); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 542–43 (7th Cir. 1988) (same); *Casavantes v. Cal. State Univ.*, 732 F.2d 1441, 1443 n.2 (9th Cir. 1984) (same).

If intake questionnaires do constitute § 626(d) "charges," then the EEOC is required, by the ADEA and its own regulations, to provide notice to employers and to effectuate conciliation efforts promptly upon receiving such documents. *See* 29 U.S.C. § 626(d); 29 C.F.R. §§ 1626.11, 1626.12. Since 1997, the EEOC has processed between 75,000 and 80,000 charges per year, which, one may surmise, is a small fraction of the number of completed intake questionnaires and other inquiries the agency receives each year. *See* U.S. Equal Employment Opportunity Comm'n, Charge Statistics FY 1997 through FY 2006, http://www.eeoc.gov/stats/charges.html (last visited August 7, 2007).[7] If every intake questionnaire suffices as a charge and triggers its investigative machinery, the EEOC's workload will increase significantly.[8]

On the other hand, if the EEOC does not treat an intake questionnaire as a charge, but that document is nevertheless held to satisfy § 626(d)'s charge requirement, the EEOC's congressionally mandated duties are, in effect, nullified. As

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[7] The EEOC does not report on its website the number of completed intake questionnaires it receives annually.

[8] The Second Circuit's "manifest intent" standard would present its own problems for the EEOC. Under that standard, the EEOC presumably would be required to scrutinize the thousands of intake questionnaires it receives in an attempt to determine which ones exhibit sufficient "forcefulness" to constitute a "charge" and trigger its statutory obligations under § 626(d).

previously discussed, the EEOC is required to promptly do two things when it receives a charge: it *shall* provide notice to the employer and it *shall* seek to eliminate the alleged discrimination informally. 29 U.S.C. § 626(d); 29 C.F.R. §§ 1626.11, 1626.12. If the EEOC is not required to treat all intake questionnaires as charges, but employees are nevertheless permitted to bring suit after having merely submitted an intake questionnaire, then plaintiffs (and their lawyers) may unilaterally bypass the statutory requirements simply by submitting a completed intake questionnaire, rather than a charge, and then bringing suit sixty days later.[9]

Congress structured the ADEA so that the EEOC will play a significant role in preventing and resolving claims of age discrimination. *See* 29 U.S.C. § 626(b), (d). Allowing suit to be brought without regard to whether the EEOC treated an intake questionnaire as a charge perverts that structure and makes the EEOC nothing more than a mere base to touch on one's way to the courthouse.[10]

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[9] In fact, that is what happened in this case. The EEOC never completed its conciliatory efforts and investigation of Kennedy's charge because Kennedy had "filed a lawsuit . . . on the same basis and issues in a court of competent jurisdiction" before the EEOC could do its job. *See supra* note 3.

[10] FedEx's petition for certiorari alluded to the ripple effects of disregarding the requirements of notice and conciliation efforts resulting from the principle of "piggybacking." *See, e.g.*, Pet. 4-5, 27. Under this principle, "where one plaintiff has filed a timely EEOC complaint, other non-filing plaintiffs may join in the action if their individual claims arise out of similar discriminatory treatment in the same time frame" and the filed charge "provides some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on

II. NOTHING ABOUT THIS CASE WARRANTS DEPARTURE FROM § 626(d).

As shown above, the ADEA clearly requires that, in order to constitute a "charge" under § 626(d), a document must activate the EEOC's notice and conciliation processes. That is the end of the matter. Where Congress has spoken, it is not for the courts to create their own different rules. But even if it were appropriate for a court to bypass the requirements of § 626(d) in the interest of fairness, there would be no grounds for doing so here. Respondent Kennedy had no reason to believe that she had filed the requisite "charge" when she submitted her intake questionnaire, and there is no unfairness in holding her to the terms of the statute.

A. It is improper to disregard the statute based on perceived "unfairness" to the employee.

Notwithstanding a plain statutory scheme requiring that a "charge" result in notice and conciliation efforts, the Second Circuit held that Kennedy's intake questionnaire, which did not result in notice and conciliation efforts, nevertheless constituted a "charge" under § 626(d). Pet. App. 5a, 20a. The Second Circuit overrode the statute's functional definition of "charge" because it felt that it would be unfair to "establish a prerequisite to suit beyond the plaintiff's control." *Id.* at 17a. To avoid that perceived unfairness, the Second Circuit instead applied its "manifest intent" test and held that Kennedy's intake questionnaire was a charge simply because,

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the claim." *See* Pet. App. 11a (marks omitted). All of the problems identified here are magnified when non-filing plaintiffs are permitted to piggyback on an intake questionnaire that did not itself satisfy § 626(d).

in the court's view, its "forceful tone and content" somehow "communicated Kennedy's intent to activate the EEOC's administrative process." *Id.* at 19a–20a.

The Second Circuit's ruling impermissibly disregarded the terms of the statute. "It is the duty of courts to interpret the[] laws [passed by Congress] and apply them in such a way that the congressional purpose is realized." *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 828 (1986). Allowing a lawsuit to proceed where no timely charge has been filed and no notice or conciliation efforts have taken place violates, rather than effectuates, Congress' purpose—even when doing so is based on a court's perception of "fairness." Doing so ignores the countervailing unfairness and inefficiencies caused by depriving employers of pre-suit notice and the opportunity to resolve the issue before litigation is commenced. It is neither the lower courts' nor this Court's "prerogative to change the ways in which [the ADEA] balances the interests of aggrieved employees against the interest in encouraging" voluntary conciliation between the parties and providing employers with pre-suit notice of the allegations against them. *See Ledbetter v. White*, 127 S. Ct. 2162, 2177 (2007). Instead, as this Court has recently reaffirmed, courts must be "[r]espectful of the legislative process that crafted this [statutory] scheme [and] must give effect to the statute as enacted." *Id.* at 2170 (marks omitted); *see also Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.").

In this case, giving effect to § 626(d) as enacted means requiring notice to the employer and attempts at conciliation before an intake questionnaire can suffice as the charge

required by § 626(d). Any change to this statutory framework must come from the legislature, not the judiciary. *See Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 568 n.27 (1990) ("[W]e have a duty to be faithful to congressional intent when interpreting statutes and are not free to consider whether, or how, the statute should be rewritten."); *cf. United States v. Mezzanatto*, 513 U.S. 196, 216 n.1 (1995) ("The Court's obligation is to interpret criminal procedure and evidentiary rules according to congressional intent. If the Government believes that the better rule is different from what is currently the law, the Government can petition Congress to change it.").

"Congress has not been shy in revising other judicial constructions of the ADEA," *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 n.7 (2004), and Congress will undoubtedly do so here if it believes a change to § 626(d) is warranted. Until then, the courts should enforce § 626(d) as written and effectuate Congress' plain intent by requiring that a "charge" result in EEOC notice to the employer and attempts at voluntary conciliation.

B. <u>There was no unfairness to the employee in this case.</u>

The ADEA leaves no room for courts to excuse the notice and conciliation prerequisites of § 626(d). Even if an exception to § 626(d) could be crafted, however, none was appropriate here, where proper application of the statute would result in no unfairness to the employee.

Some lower courts have attempted to justify a limited exception to the requirements of § 626(d) where the EEOC misled a hapless employee into believing that the intake questionnaire she submitted was a charge or would be treated

as a charge. Here, however, there is neither an allegation nor was there a presentation of evidence that the EEOC misinformed Kennedy about the status of her charge or suggested in any way that her intake questionnaire was sufficient to satisfy her obligations under § 626(d).[11] In fact, Kennedy has not even alleged, much less shown any evidence, that she actually thought her intake questionnaire sufficed as the charge required by § 626(d). On the contrary, the evidence shows that Kennedy could not have reasonably believed that her intake questionnaire would be treated or sufficed as a charge. Kennedy submitted a two-page Form 283, which expressly noted that it would be used for pre-charge purposes, JA 265, as well as a five-page affidavit that appears to have been drafted with assistance from a lawyer, JA 266-74. In addition, Kennedy eventually filed a charge of discrimination with the EEOC—a strong indication that she did not believe that her earlier intake questionnaire sufficed as the charge required by § 626(d). JA 275; *see Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir. 2005) ("If Bost believed that he had filed a charge of discrimination

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[11] That fact distinguishes this case from cases like *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534 (7th Cir. 1988), where communications from the EEOC misled an employee. *See id.* at 544 ("The problem in this case is that the EEOC informed Steffen that it would be treating the Intake Questionnaire as a charge but then failed to treat it as a charge."). Given the clear statutory scheme requiring a "charge" to result in notice and conciliation, the *Steffen* court's holding that the plaintiff's intake questionnaire satisfied § 626(d) even though it did not result in notice and conciliation was inappropriate. If some exception from the statutory requirements were to be permitted based on fairness concerns, however, it should only be in cases like *Steffen*, where there has been a demonstration of reasonable reliance on misleading communications from the EEOC.

when he filed the intake questionnaire, he would not have filed an additional timely charge of discrimination."); *Diez v. Minn. Mining & Mfg. Co.*, 88 F.3d 672, 677 (8th Cir. 1996).

Nor is this a case where, if Kennedy's intake questionnaire were not considered a "charge," she would have been foreclosed from bringing an ADEA suit altogether. On May 30, 2002, Kennedy filed a charge of age discrimination with the EEOC. JA 275. That charge initiated the EEOC's investigatory machinery, as required by § 626(d). Thus, had Kennedy simply waited to file her ADEA lawsuit until sixty days after May 30, as § 626(d) required, she would have satisfied the prerequisites of § 626(d) and been permitted to proceed with her lawsuit just as Congress intended. Instead, however, Kennedy sued first and filed her charge second, in clear violation of § 626(d). As a result, FedEx was deprived of pre-suit notice of Kennedy's allegations and any opportunity to resolve Kennedy's claims without litigation. Although Kennedy's charge initially activated the EEOC's investigatory machinery, her premature lawsuit caused the EEOC to abort its statutory functions before completing them. *See supra* note 3.[12]

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[12] The EEOC routinely treats completed Form 5 "Charges of Discrimination" as charges, unlike intake questionnaires. Thus, simply using the correct form before filing suit is overwhelmingly likely to forestall all of the problems created by the misuse of the intake questionnaire in this case. In any event, any issue regarding the status of a rare Form 5 that is not acted upon by the EEOC is left for another day because the EEOC acted on Kennedy's Form 5 by giving notice of the charge to FedEx. The EEOC was foreclosed from fulfilling its other statutory duty of attempting to resolve Kennedy's claims without litigation by Kennedy's premature lawsuit.

While the Second Circuit purported to base its conclusion below on concerns about "unfairness" to plaintiffs, the facts show that the real unfairness in this case was to FedEx. Kennedy was permitted to avoid the consequences of her own impatience at FedEx's expense. Rather than holding Kennedy accountable for her failure to follow the ADEA's command to file a charge and then wait sixty days before suing, the Second Circuit instead dispensed with FedEx's statutory right to receive pre-suit notice of Kennedy's claims and an opportunity to resolve those claims informally. Fundamentally, the Second Circuit rejected Congress' balancing in the ADEA of the competing interests between employees and employers, and presumptuously substituted its own preference. Such an unprincipled decision could not possibly have been intended by Congress—and should not be countenanced by this Court.

C. The "manifest intent" test applied by the Second Circuit is an invitation for mischief and otherwise too unclear to be workable.

Even if concerns about perceived unfairness could in some circumstances be grounds for departing from the strictures of § 626(d), the Second Circuit's "manifest intent" test would be entirely unsuitable for identifying such circumstances. Its "manifest intent" test both invites mischief by the opportunistic who want to avoid the administrative process and creates uncertainty for all litigants and the EEOC.

Under the Second Circuit's "manifest intent" test, any document that contains the minimum content required by the EEOC's interpreting regulations and "demonstrates a party's intent to activate the EEOC's administrative process" constitutes a charge. Pet. App. 16a. Whether the document communicates such an intent is determined by reference to the

"tone and content" of the document. *See* Pet. App. 19a. Absolutely no evidence of the employee's belief—reasonable or otherwise—that the document would in fact satisfy the statutory requirements is necessary. Nor is any other evidence of some "unfairness" that would result from enforcement of the statutory requirement that a "charge" activate the EEOC's notice and conciliation processes required.

Under the Second Circuit's test, an intake questionnaire with a forceful enough "tone" would suffice as a charge even if the employee *knew* that the document would not be treated as a charge and intentionally filed it, rather than a charge, for the very purpose of bypassing notice and conciliation requirements and proceeding straight to litigation. This opportunity for mischief is only enhanced when an employee is represented by counsel. A clever attorney wishing to avoid the inconvenience of exhausting administrative remedies could easily do so simply by having his client complete an intake questionnaire, which is generally not treated as a charge, rather than a Form 5.

Such a test, which permits an employee (or her attorney) to purposefully evade the congressionally-established framework for reducing and resolving claims of age discrimination, should not be tolerated by this Court. If an employee wants an intake questionnaire that fails to fulfill the functions of a charge nevertheless to suffice as a charge, she should, at the very least, be required to show—through evidence that the EEOC misled her or otherwise—that she reasonably believed that the document she submitted would be noticed to the employer and would result in informal resolution efforts. Otherwise, intake questionnaires can be used to render Congress' statutory scheme a dead letter and the EEOC defunct (unless, of course, the EEOC takes the

opposite tack and consumes its resources providing notice and conciliating every time an intake questionnaire is submitted).

In addition, the Second Circuit's highly subjective "manifest intent" test, with its focus on "tone and content," is wholly unworkable even when not used deliberately as a mechanism to bypass § 626(d). Whether any particular submission exhibits a sufficient "tone and content" is an entirely subjective determination likely to lead to different outcomes in cases involving substantially similar facts. *Compare, e.g., Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir. 2004) *with* Pet. App. 3a-23a. Under the Second Circuit's standard, a potential plaintiff who files an intake questionnaire will have no way of knowing in advance whether he has exhibited a sufficiently "forceful" tone to have met the statutory requirement for a charge. Nor will an employer that (unlike FedEx here) learns of the submission of an intake questionnaire know whether that document constitutes a "charge" subjecting it to suit under the ADEA—at least, not until a court analyzes the "tone and content" of the intake questionnaire. Even the EEOC, as discussed *supra* note 8, will be left to analyze the "tone" of every intake questionnaire it receives to determine whether it is actually a "charge" that triggers its notice and conciliation obligations. The statutory scheme carefully designed by Congress simply cannot function unless all of the relevant parties are given much clearer guidance as to what constitutes a "charge" than is available under the Second Circuit's "manifest intent" standard.

CONCLUSION

For the foregoing reasons, the Second Circuit's decision should be reversed with instructions to affirm the district court's decision dismissing the claims of Kennedy and those

respondents attempting to piggyback on Kennedy's intake questionnaire.

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FEDERAL EXPRESS CORPORATION,

Petitioner,

v.

PAUL HOLOWECKI, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

1. Whether the procedural regulation of the Equal Employment Opportunity Commission under the ADEA, 29 C.F.R. § 1626, which provides that the first writing filed by a potential plaintiff with the Commission that identifies the parties and the general nature of the discrimination is controlling on the question of when a charge is filed?

2. Whether the Commission's failure promptly to notify the employer that a charge has been filed delays or diminishes the charging party's right to bring and prosecute a private suit to vindicate her claims under the ADEA?

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OPINIONS BELOW AND JURISDICTIONAL STATEMENT

Respondents accept as correct the Petitioner's Statement of the Opinions below and the Jurisdictional Statement.

STATUTE AND REGULATIONS INVOLVED

Respondents note that Section 7(d) of the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 626(d) is involved, as stated by the Petitioner, but they believe that Section 7(c) is also involved, and that Section 9 of the ADEA, 29 U.S.C. § 28 is also involved, but is not included in the Joint Appendix. That Section states in relevant part:

> In accordance with the provisions of the Administrative Procedure Act, the Equal Employment Opportunity Commission may issue such rules and regulations as it may deem necessary or appropriate for carrying out this chapter . . .

The Regulation of the Commission Under the ADEA entitled "Procedures" is set forth in part in the Joint Appendix at 350-353.

STATEMENT

1. The Basic Facts.

Federal Express Corporation ("Federal Express") is a corporation engaged in the pick-up and delivery of letters and small packages the next day by ground and air. Federal Express has thousands of couriers who drive small trucks and pick-up and deliver packages throughout the United States, most of which are carried by airplane and are to be delivered by 10:30 a.m. the next morning.

Respondents are fourteen current or former couriers of Federal Express employed in California, Florida, Illinois, New York, New Jersey, Michigan and other states, who have more than ten (10) years of experience as couriers of Federal Express and were over age 40 as of early 2002. JA 19-20.

Respondents Kennedy, McQuillan, Robertson and other couriers of Federal Express had filed formal charges and other writings with the Equal Employment Opportunity Commission (the "Commission") or authorized state or local agencies from 1997 through 2001 in which they allege that Federal Express has engaged in age discriminatory practices against experienced older couriers in favor of younger, less experienced couriers, and that the practices were continuing. JA 96-109; 119-162.

A. The Charges of McQuillan and Robertson. In his charge, McQuillan, born in 1955, stated that he had been employed by Federal Express as a

courier in Hicksville, New York for more than 14 years and that Federal Express terminated his employment on March 31, 1998, and told him it was because of unsatisfactory performance. He stated that in fact he had always performed satisfactorily, and that Federal Express had "initiated a program that was supposed to be an incentive bonus plan" . . . but that the program "eventually became minimum standards . . . which were enforced more stringently on senior employees." JA 96-99.

Respondent Robertson had worked for Federal Express for approximately 16 years in Illinois, until September 8, 2000, when Federal Express terminated his employment while he was 40 years old. On December 1, 2000, he filed a formal charge of discrimination (EEOC Form 5) with the Illinois Dept. of Human Rights that was cross filed with the EEOC, in which he alleged the facts set forth above. He verified the allegations "under penalty of perjury." JA 101-103.

EEOC sent plaintiff Robertson a right-to-sue letter dated April 25, 2001. JA 102-103. But according to Robertson's Declaration, although he twice advised the postal services of the changes of address, he did not receive that letter in 2001, but instead wrote again to EEOC in January or early February, 2002 to ask for the current status of the charge. EEOC responded only by sending him a copy of its letter of April 25, 2001. He received the letter shortly after February 2, 2002. JA 263-264.

This suit was filed by Respondents McQuillan, Robertson and Kennedy and eleven other couriers of Federal Express on April 29 or 30, 2002, more than 110 days after Robertson's formal charge was filed with the Commission on December 1, 2000, and less than 90 days after he received the right to sue letter. JA 19.

B. The Kennedy Administrative Filing. On December 3, 2001, Respondent Patricia Kennedy filled out and signed allegations that Federal Express had discriminated against her and other older couriers because of their age in a detailed, single-spaced "AFFIDAVIT" dated December 3, 2001. JA 266-274. She sent the affidavit and a fully executed intake questionnaire to EEOC on or before December 11, 2001. *Id.*

Her Affidavit asserts that "FedEx through its Best Practices Pays Program has targeted myself and others . . . have and still are discriminating against me because of my age," that "I know of several older couriers who were fired and/or constructively terminated as a result of these BPP and procedure changes. I don't know of a single younger courier who lost their job because of such policies." JA 268. She continued: "Every year my employer's Survey Feedback action or SFE promises so long as I do a good job I'll always have a job! . . . my company has through its BPP practices completely polluted the methods of . . . defining what is a 'good job' . . . that older employees like myself no longer know if we even will have a job tomorrow . . . " JA 268. "Management's purpose is

clear; they want us to see the disparaging treatment and become so disgusted we quit." JA 271-272. She continued (JA 273):

> Federal Express does not want us pre-1988 senior employees to continue our employment lest they will have to pay our retirement health benefits if we can complete 10 years of continuous service between age 45 and 55. Please force Federal Express to end their age discrimination plan so we can finish our careers absent the unfairness . . .

In the same filing, Respondent Kennedy answered fully and executed an EEOC Questionnaire [Form 283] in which she asserted "age discrimination" by employer Federal Express in the names asserted in her Affidavit. JA 265-266.

That EEOC Form 283 she signed states: "Normally your identity will be disclosed to the organization which allegedly discriminated against you," and asks "Do you consent or not consent to such disclosures?"

Respondent Kennedy checked the "consent" box "yes" to indicate her consent that the Commission provide her identity to her employer, Federal Express, and on December 3, 2001 she signed the document. JA 265 (two pages, pullout). She checked "no" under the box that asked if she had sought assistance about her allegations from an attorney or other source. *Id.* She executed and filed the same form on February 3, 2002. *Id.*

C. Earlier Allegations of Age Discriminatory Practices By Other Couriers. The Respondents in this case were not the first couriers to advise EEOC of their belief that Federal Express was engaging in age discrimination against its older, senior couriers. Jack Hainline filed such a charge with the Tampa Office of EEOC against Federal Express (#151 95 1501) in 1995, and received a right to sue letter dated June 26, 1996. JA 107-109.

In early May 1996 courier Gerald Freeman complained of age discrimination within Federal Express in a letter to Mr. Chan, Managing Director of the Southern Division. JA 215-217.

In a letter to Freeman dated May 16, 1996 sent by overnight delivery, Mr. Chan stated that "I would like to address the issue of age discrimination . . . " but because of Freeman's "refusal to utilize the internal EEO process, I am setting that issue aside." JA 222-223. He rejected Freeman's apparent claim that younger and newer couriers were given the earlier start times, and advised Freeman of his right to proceed under Step II of the Guaranteed Fair Treatment Procedures of Federal Express. JA 223-224. Mr. Chan sent copies of his letter to the Vice President of the Southern Division and the Senior Vice President for Domestic Operations at Federal Express Headquarters in Memphis. JA 224-225.

By letter of May 22, 1996, Mr. Freeman wrote Mr. Scott Bunker that "Mr. Chan's response to my

GFT served as a reminder that the problem (self-regulation/investigation) is not a personnel problem but rather it's a system failure . . . " JA 227-229.

On July 8, 1996, Freeman filed a formal charge of age discrimination against Federal Express with the Clearwater Human Relations Department. JA 150-152. In 1997 and in early 1998 four other couriers filed similar age discrimination charges against Federal Express. (JA 155-157, 160-162, 170-172 and 175-177). Charging Party Maccia also filed his Affidavit with the Commission (JA 230-239):

> "These changes were orchestrated by Federal Express Corporate Headquarters in Memphis, Tennessee to target their older work force, nationwide! No matter where my travels, in speaking with other Federal Express employees . . . in . . . [twelve states listed] . . . ALL displayed the same frustrations with the harassment tactics of management toward them and other senior employees. It's obvious Federal Express' goals are to reduce their operation cost, rightly so, but not at the expense of their aging workforce . . . "

That affidavit also refers to Survey Feedback Action which, in its annual survey of employee attitudes, asks "CAN BE SURE OF A JOB IF I DO GOOD WORK" in Number 15. JA 238. Maccia alleged "I know that I have performed a good job up until now, however, but . . . Every employee 40 years old or older with 10 or more years' service are being focused on by management . . . aging and senior employees' rights

were violated by management." JA 238-239. The EEOC issued right to sue letters to the five charging couriers; Freeman, Maccia, Clausnitzer, Creamer and Krolman, in August and September 1999. JA 153-154, 158-159, 166-169, 173-174, 178-179.

Those five couriers, plus Wayne C. Tate, brought suit *pro se* to enforce their rights under the ADEA on October 26, 1999. *Freeman et al. v. Federal Express Corp., et al.*, 99-CV-2466. They alleged that Federal Express follows a nationwide practice of age discrimination against its older couriers, and the docket shows "CLASS ACTION COMPLAINT." JA 115. On January 27, 2000, the six Plaintiffs in that suit filed a Motion for Class Certification. JA 118. That motion was stricken by order of February 3, 2000 and the complaint was dismissed without prejudice. Plaintiffs were given 20 days within which to file an amended complaint on September 25, 2000. JA 131. A timely motion to reconsider was denied on October 16, 2000, and Freeman, et al. filed a timely motion of appeal on October 16, 2000, and Freeman et al. filed a timely motion of appeal on October 24, 2000. JA 134. On February 20, 2001 the district court entered an order setting March 9, 2001 as the date for the Plaintiffs to file an amended complaint. JA 140.

On March 6, 2001, Plaintiffs, represented by counsel, filed an Amended Complaint for the five original plaintiffs in that case and added ten (10) additional plaintiffs including Respondents Kubicki, Lewis, McQuillan, Moncalieri, Mutchler, Nelson and

Tucker. JA 142-143. That suit was closed administratively on March 28, 2002. JA 147.

2. Proceedings in this Case in the District Court Below.

In their Class Action Complaint filed on April 30, 2002, the fourteen Respondents allege that they are or were employed by Federal Express as couriers in the United States for ten (10) years or more and that they were age 40 and older, and that they "bring this suit on behalf of themselves and similarly situated Federal Express couriers." JA 20. They allege that Federal Express encourages managers and other supervisors to target older couriers for discipline and termination, and particularly to target older couriers who had been injured on the job or otherwise that required absences for medical reasons, and that Federal Express gave younger couriers preference over older couriers in starting times, overtime assignments and route assignments. JA 20-26.

The Complaint alleges that Federal Express engaged in a pattern or practice of employment practices that discriminate against older couriers and in favor of younger couriers in nine stated ways, and that such discriminatory practices have become the rule rather than the exception, and that such practices are not consistent with business necessity. JA 23-27.

The Complaint also alleges that Federal Express was on notice at all times since May 1995 of the

allegations of age discrimination in employment against older couriers, and that "Some of the Plaintiffs timely notified the EEOC of the discriminatory practices more than 60 days before this date"; that is, more than 60 days before April 30, 2002. JA 28-29. The Complaint further alleges in Count II that age discriminatory practices of Federal Express "are unlawful" under the laws of New York and "are also unlawful in California, Florida, Michigan and New Jersey . . . " and in other states. JA 31-32. Federal Express did not file an Answer. JA 1-2.

On July 16, 2002, Petitioner Federal Express filed a motion to dismiss the complaint under Rule 12(b)(6), supported by an Affirmation by its New York attorney, and sought payment of its costs and reasonable fees "for having to bring this motion and defend this frivolous lawsuit." JA 2. That filing was approximately 78 days after suit was filed. Federal Express also filed a Declaration of its Senior Attorney with eight exhibits in support of the motion to dismiss. JA 3 and JA 59-63, Exhibits at JA 64-106.

Respondents Holowecki et al. filed a timely memorandum of law in opposition to the motion and a Declaration of Respondent George Robertson. JA 3-4, and JA 263-264. Among the Exhibits filed by Respondents were an Intake Questionnaire and Affidavit of Freeman dated June 6, 1996 and an Affidavit of Maccia, and the fully answered Intake Questionnaire of Kennedy JA 265 (two pages) and her Affidavit signed and notarized on December 3, 2001. JA 266-274.

Kennedy's formal charge (EEOC Form 5) was executed on May 30, 2002. JA 275.

On Aug. 20, 2002, Federal Express filed its Reply Memorandum with a "Supplemental Declaration" of its attorney, in support of its motion to dismiss under Rule 12(b). JA 278. In its Reply Memorandum, Federal Express recognized that this Court, in *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002), sustained the "EEOC regulation stating that an otherwise untimely filed charge of discrimination under Title VII may be verified after filing" but also cited and relied upon *Bihler v. Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983). Reply Memorandum, JA 287, fn. 3. In that filing, Federal Express also recognizes that the ADEA, 29 U.S.C. § 626(d) provides that "[u]pon receiving such a charge, the Commission shall promptly notify . . . prospective defendants and shall promptly seek to eliminate any alleged unlawful practices . . . " Reply Memo. of Federal Express at notes 3 and 4, JA 287.

Federal Express requested that the Court dismiss the Complaint. JA 36-37. With respect to Kennedy, Federal Express stated that she "has not complied with the 60-day waiting period that is a jurisdictional predicate for suit under the ADEA." JA 297-298.

Federal Express asserted that the events alleged to be discriminatory were "business decisions implemented by FedEx eight years ago," and that "None of the named plaintiffs filed a charge with the . . . EEOC

that can serve as the administrative basis necessary to bring this action and all of the claims are time barred." JA 44. The Memoranda of Federal Express filed in support of the motion did not mention the procedural regulation of the EEOC under the ADEA, 29 C.F.R. § 1626. JA 40-58 at 281-282.

In their memorandum in opposition to the motion, plaintiffs (Respondents here) relied upon the language of the Complaint and the charge of Robertson, filed on December 1, 2000, and on the December 2001 filing of plaintiff Kennedy. JA 180-192. They expressly relied upon the EEOC regulation under the ADEA defining "charge" and they quoted from 29 C.F.R. §§ 1626.6, and 1626.8(b) and argued that Kennedy's December 12, 2001 filing was a "charge" and that the later filed document related back to that date, citing the decision of the Supreme Court in *Edelman v. Lynchburg College, supra.* JA 190-192.

Federal Express, in its Reply Memorandum again failed to discuss the regulation of the Commission under the ADEA defining what constitutes a charge and when a writing addressed to the Commission is considered received, 29 C.F.R. §§ 1626.3, 1626.6, and 29 C.F.R. § 1626.8(b).

By Memorandum and Order filed on October 2, 2002, the district court ruled for Federal Express. JA 299-306. In that decision the district court ruled that although McQuillan and Robertson did file charges in 1998 and in 2000, they were filed too late, namely "nearly four years after implementation of

the policies challenged in this lawsuit" and "over six years after plaintiffs claim the policies were implemented." JA 306.

With respect to Kennedy's charge, the district court ruled [JA 306-307] that:

> Kennedy filed an administrative charge on May 30, 2002. Therefore she failed to meet the requirements of Section 626(d). . . . [the ADEA] specifically requires that a 'charge' be filed prior to the commencing of a civil action . . . If Congress had intended that an intake questionnaire or affidavit constituted sufficient notice to EEOC of alleged discrimination, it could have specifically stated, so but it did not . . . the Kennedy questionnaire and affidavit should not be considered the equivalent of a charge . . . "

In short the District Court ruled that the charges of McQuillan and Robertson were filed too late. JA 306. At the same time the district court ruled that with respect to Respondent Kennedy, the suit was filed prematurely, because the ADEA "requires that a 'charge' be filed with EEOC prior to commencing a civil action, and the charge was not filed until May 30, 2002, approximately 30 days after the suit was filed. JA 307.

Judgment was entered on October 23, 2002 dismissing "plaintiffs' ADEA claims . . . without leave to replead." JA 311. Plaintiffs filed a timely motion to alter or amend on October 24, 2002, which was denied by Order entered on May 5, 2004. JA 7.

3. Proceedings in the Court of Appeals for the Second Circuit Below.

A timely appeal by Plaintiffs-Appellants was filed on June 4, 2004. JA 8.

The Brief of Federal Express Corp. in the Second Circuit did not cite the Regulation under the ADEA, 29 C.F.R. §§ 1626.3, 1626.6 or 1626.8, nor did it discuss the EEOC regulation under Title VII, 29 C.F.R. § 1601.12(b), setting forth what kind of writing is a charge under Title VII and when it is considered received. See the Brief on Appeal of Federal Express, TOC, vii, and B, and Summary of Argument and Argument, at 11-34.

In that Brief, Federal Express acknowledged that "under *Edelman*, a timely but unverified charge can be validated after the expiration of the limitations period" but argued that the "facts and circumstances surrounding the submission of an Intake Questionnaire are necessarily relevant . . . " Brief for Federal Express on Appeal at 20-21. It noted that "At least five circuits have adopted a test of 'manifest intent' to determine whether a non-charge submission to the EEOC constitutes a charge . . . This test is consistent with the letter and spirit of the ADEA and supporting regulations." *Id.* at 21.

Federal Express urged the Court of Appeals below to follow the "manifest intent test" standard for determining what writing, not on a Form 5 Charge, is a "charge" within the meaning of the ADEA and Title VII, and to rule that the Kennedy documents were

not a "charge" because "the record shows no proof that Kennedy took any action to activate the EEOC's machinery . . . " *Id.* at 21-25 (quotation from 23, n. 17, last sentence).[1]

The Second Circuit, per Circuit Judges Kearse, Calabresi and Pooler, in an Opinion by Judge Pooler, reversed the decision of the district court and remanded, Pet. App. B, at 3a-23a.

The Court of Appeals noted that the ADEA requires the filing of a timely charge, but does not define "charge." Pet. App. at 14a. It noted that the EEOC's regulations specify the "requisite information that must appear in a 'charge,'" and what a charge "'should contain'" citing 29 C.F.R. §§ 1626.3, 11626.6 and 1626.8. Pet. App. 14a. The Court of Appeals also ruled that "Kennedy's Questionnaire satisfied the EEOC . . . " regulation. Pet. App. 18a. The Court also noted that "Some Circuits have imposed an additional requirement, the 'manifest intent rule,' that is not explicitly stated in the statute or interpreting regulations." The Court stated that (Pet. App. 15a):

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[1] In that sentence Federal Express fails to note that Mrs. Kennedy filed not only fully executed "Intake Questionnaire" in Dec. 2001 (JA 265, two-page document), but that she filed at the same time a six-page Affidavit which contained all of the information that the EEOC prefers to have (29 C.F.R. § 1626.28(a)), and is subject to penalty of perjury. JA 266-274. In addition, in early February, she again executed the Intake Questionnaire and sent it to EEOC. JA 265. See text above at 304.

> " . . . notice to the EEOC must be of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act's machinery."

Bihler v. Singer Co., 710 F.2d 96, 99 (3d Cir. 1983). Pet. App. 14a-16a.

In any event, that court of appeals below ruled that the fully executed Intake Questionnaire and Affidavit of Respondent Kennedy "provided written notice to the EEOC that 'would convince a reasonable person' that Kennedy intended 'to activate the Act's machinery.'" Pet. App. 18a-20a (quote from 19a).

In so ruling, however, the Second Circuit below rejected the argument of Federal Express below that Kennedy's filing was not a charge because EEOC had not treated it as such, and ruled instead that (JA 16a):

> " . . . if an individual satisfactorily notifies the EEOC of her charge, she is not foreclosed from federal suit merely because the EEOC fails to follow through with notifying the employer and attempting to resolve the matter . . . "

SUMMARY OF ARGUMENT

I. The decision of the Court of Appeals below correctly ruled that the writings filed by Respondent Kennedy in early December, 2001 constituted a charge under the lawful regulation of the Commission

promulgated under the ADEA. 29 C.F.R. §§ 1626 and 1628(b) and JA 351 and 352. This Court should affirm the judgment of the Court of Appeals on that ground alone so that claims of all the other respondents can be decided by a jury on the evidence.

Like Title VII, the ADEA requires that a prospective plaintiff file a "charge" before she or he can file suit to enforce the rights granted, and like Title VII, the ADEA does not contain a definition of the word "charge" in its text. A charge is defined under the valid Commission regulations which impose "minimal" requirements (a writing identifying the parties and generally describing the conduct alleged to be discriminatory) on the charging party; and a provision that the charge can be amended and that amendments relate back to the date of the first writing received by the Commission. 29 C.F.R. §§ 1626.6 and 1626.8(b); 29 C.F.R. § 1601.12(b).

Federal Express does not directly challenge the lawfulness of the Regulation, but attempts to avoid its plain language and the consequences. Under the regulation, the Kennedy filing was a charge that tolled any period of limitations, and a charge that preceded the filing of this case by more than four months. The decision of the Court of Appeals should be affirmed on the basis of the regulation. *Edelman v. Lynchburg College*, *supra*, 535 U.S. at 112-120; *Chevron v. Exhazabal*, 436 U.S. 73 (2002).

II. The Commission's failure to treat the Kennedy documents of December 2001 as a "charge" and

"promptly" and to perform the other duties imposed on it by the Act do not diminish the rights of the charging party to have her claims determined on their merits. *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972) (procedural technicalities outside the control of the plaintiff not favored); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979); *Edelman v. Lynchburg College*, *supra*, 300 F.3d at 404-405; *LaQuaglia v. Rio Hotel & Casino*, 186 F.3d 1172, 1175-1176 (9th Cir. 1999). The Court should hold, consistent with the language of 29 U.S.C. § 626(d), that a "charge" is filed if it complies with EEOC regulations, even if EEOC fails to act on the charge.

Such holding will effectuate the charge filing provisions of the ADEA which were adopted in 1978 Amendments to the Act. The Amendments were intended to prevent dismissal of cases on technical grounds so that older employees would have a chance to prove the merits of their claims. Sen. Rep. 493, 95th Cong. 1st Sess. 12 (1977). Federal Express provides history quotations from the legislative history of the 1967 Act. Brief for Petitioner at 13-15. Those materials are not relevant, because the "charge" requirements were not in the Act before 1978. See also, pages 21 to 22.

The Commission's regulation provides an objective and easily understood standard for determining when a writing is a charge. 29 C.F.R. §§ 1626.6 and 1626.8(b). Under that standard a document is a charge if it identifies the employer and the charging party, and if it alleges generally the nature of the

discriminatory practice of conduct. There is no doubt that the Kennedy filing satisfied that standard. In those few situations where there may be some ambiguity, the Commission should provide notice to the employer promptly, unless the author of the writing expressly instructs the Commission not to do so.

III. Petitioner Federal Express urged the Court of Appeals below to affirm the district court ruling with respect to Respondent Kennedy because her writings failed to demonstrate that she had a "manifest intent" to have the Commission commence proceedings.

The Court of Appeals below applied the manifest intent standard as requested by Federal Express. It concluded "that Kennedy provided written notice to the EEOC that would convince a reasonable person that Kennedy intended to activate the machinery" and that EEOC erred by failing to act in response to the Kennedy's manifested intent. Pet. App. 19a.

If the Court does reach the issue of manifest intent, Respondents believe the decision of the court of Appeals below should be sustained because Kennedy's writings not only met the minimal standard of the Regulation set forth in 29 C.F.R. §§ 1626 and 1626.8(b), JA 351-352, but contained all of the information the Commission desires to have in a charge (29 C.F.R. § 1626.8(a), and JA 352), and went beyond that standard by filing the Form 283 both in December 2001 and February 2002, and by submitting a

writing under penalty of perjury. *Edelman v. Lynchburg College*, 535 U.S. 106, 114 (2002).

ARGUMENT[2]

I. THE REGULATION OF THE COMMISSION DEFINING WHEN A CHARGE IS SUFFICIENT UNDER THE ADEA IS LAWFUL AND THE KENNEDY FILINGS CONSTITUTE A CHARGE AS SO DEFINED.

A. The Regulation of the Commission under the ADEA provides that "A charge shall be in writing and shall name the prospective respondent and shall generally describe the discriminatory acts." 29 C.F.R. § 1626.6. JA 351. It also provides that "a charge is sufficient when the Commission receives from the person making the charge . . . [such] a written statement, and that any amendment shall relate back to the date the document was first received." 29 C.F.R. §§ 1626.8(b) and (c). JA 352.

[2] Federal Express has not challenged in this Court the ruling of the Court of Appeals below that held the district court had erred in granting the motion to dismiss, and reinstating the claims of Robertson and McQuillan. Pet. App. 21a-22a; Petition and Brief of Federal Express. Rather, Federal Express contests only the right of Kennedy to be a plaintiff. Federal Express Brief at 5-31. This Brief is accordingly based upon the understanding that the rights of Robertson and McQuillan to proceed are to be determined by the district court after remand, and regardless of this Court's decision.

This Court ruled in 2002 that the relation back regulation of the Commission under Title VII is lawful and binding. *Edelman v. Lynchburg College*, 535 U.S. 106, 108-110 and 118-119 (2002). That regulation provides (29 C.F.R. §§ 1601.12(b) and 12(c)) that:

> . . . a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of . . . amendments. . . . will relate back to the date the charge was first received . . .

The charge filing provisions of the ADEA, 29 U.S.C. §§ 626(d) and 633(b), JA 345-50, were adopted in March 1978, and were modeled after the charge filing provisions of Title VII. *Trans World Airlines, Inc. v. Thurston et al.*, 469 U.S. 111, 121 (1985). In 1965 the procedural regulation of the EEOC under Title VII provided that "a charge that any person has engaged in or is engaging in an unlawful employment practice within the meaning of Title VII may be made by a person claiming to be aggrieved." 1966 Fed. Reg. 227, 228, 29 C.F.R. § 1601.6. That regulation also provided that a charge shall be in writing and sworn. *Id.* at 228, See 29 Fed. Reg. 1601.8.

By some time in 1966, the Commission adopted the relation-back regulation under Title VII, 29 C.F.R. § 1601.12(b) in terms substantially like the language now in that provision. *Edelman v. Lynchburg College*, *supra*, 535 at 117-118.

The procedural regulation of the Commission under the ADEA, quoted above at 18-19, was published for comment in Jan. 1981 and was adopted in Jan. 1983. 46 Fed. Reg. 9970 and 48 Fed. Reg. 138. The ADEA regulation of the Commission uses substantially the same language as the earlier issued Title VII regulation with a minor exception.[3]

The Commission "regulation of procedure" under the ADEA is authorized by Section 30 of the ADEA, 29 U.S.C. § 628. That provision authorizes the Commission "to issue such regulations as it may deem necessary or appropriate" pursuant to the provisions of the Administrative Procedures Act. The Court of Appeals below correctly ruled that the Kennedy documents filed with the Commission in early December, 2001 was a "charge" as defined by Regulation. Pet. App. at 18a; 29 C.F.R. §§ 1626.6 and 1626.8(b). The Court of Appeals so ruled. Pet. App. 18a.

Federal Express does not challenge the validity of the Regulation of the Commission under the Act nor does it attempt to explain why the Kennedy documents submitted to EEOC in December, 2001 did not comply with 29 C.F.R. § 126. Federal Express below argued that the "manifest intent" test recognized by

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[3] The ADEA regulation permits the filing of charges "received in person or by telephone . . . " but such charges "shall be reduced to writing." JA 351 and 352. That exception is mandated by the language of the ADEA which does not require writing, or the oath or other verification required by Title VII.

some of the courts of appeals should be adopted by the Second Circuit, and that under that test Kennedy's documents had not shown a "manifest intent" to activate the machinery of the Commission. Brief of Appellee, Federal Express at 17-25.

The Court of Appeals below not only ruled that "Regardless of what the EEOC communicates, or fails to communicate . . . a written filing that complies with the ADEA and contains the information required by EEOC's interpreting regulation is a charge as long as it demonstrates a party's intent to activate the administrative process." Pet. App. 19a. In effect, the Opinion on appeal below held that a document other than a Form 5 charge is a charge under the Act if it contains the information required by 29 C.F.R. § 1626, unless something written in that document shows an intent not to so proceed. Pet. App. 19a-20a.

In this Court Petitioner Federal Express argues that "The plain text of [29 U.S.C.] 626(d) makes clear that a 'charge' is a document that triggers the EEOC's mandatory duties of providing notice and initiating conciliation" so that "An intake questionnaire that is not treated as a charge by the EEOC . . . can never constitute the 'charge' that must be filed under the ADEA." Brief of Petitioner at 11. In short, Federal Express argues that an employee or other "aggrieved individual" who has provided all of the information necessary to EEOC to enable it to determine whether or not it will bring its own suit against the employer within 60 days, is barred from bringing suit because of EEOC's failure to take action promptly.

That argument is an abrupt departure from the language of the ADEA, the decisions of the Court, and from the intent of Congress in 1978, when the Amendments enacted that year borrowed from Title VII the charge filing procedures. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

For more than thirty years this Court has recognized that the charging party's right to file a suit is not defeated by EEOC's failure to follow its obligations to acknowledge receipt of the charge and to notify the applicable state agency promptly of the filing of the charge. *Love v. Pullman Co.*, 404 U.S. 522, 525-526 (1972) (EEOC's failure to treat a letter as a formal charge promptly, while holding it in abeyance, is not a bar to the charging party's suit, where the employer "makes no showing of any prejudice to its interest.").

In the Court of Appeals below, Federal Express recognized that this Court recently ruled that EEOC's "relation-back" regulation under Title VII is valid and that under that regulation a later filed charge or amendment to the charge can be cured or otherwise amended, and as a party to this Court can do under Rule 15 of the Federal Rules; and that any such amendment relates back to the date of the filing of an informal document such as a letter. Federal Express Brief on Appeal in the Second Circuit, at pp. 17-19, citing and discussing *Edelman v. Lynchburg College*, 535 U.S. 106, 118-119 (2002). Such a reading of Title VII is faithful to the text of Title VII, because the provisions of Title VII requiring the Commission to

provide notice to the employer or other respondent do not define the word "charge" expressly or by implication.

In *Edelman v. Lynchburg College, supra*, this Court sustained the lawfulness of the Commission Regulation under Title VII which provides that "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of." 535 U.S. at 110.

In that case, the letters from the plaintiff to the Commission were within 300 days of June 6, 1997, the date on which he was denied tenure, but his formal charge was not filed with the Commission until April 15, 1998, more than 300 days after the allegedly discriminatory conduct. *Id.*

The Court relied upon the line of cases holding that Title VII has "a remedial scheme in which lay persons, rather than lawyers, are expected to initiate the process." 535 U.S. at 115. The Court sustained the regulation in part because "the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently." *Id.*

Just as the regulations of the Commission control whether a "charge" is timely for purposes of the civil action provision of Title VII, so too the regulations of the Commission control whether a "charge" is timely for purposes of bringing a private action under the ADEA. 29 U.S.C. § 626(d). The legislative history of

§ 626(d) leaves no doubt that Congress intended such a result. Indeed, the ADEA, places less emphasis on the formal requirements for a charge than Title VII: the ADEA does not require a sworn, written statement and it has no "right to sue letter" prerequisite to private suit. The plain language of the statute and the regulation, together with the precedent in *Edelman* support the ruling below.

The National Labor Relations Act has required the filing of a "charge" at least since 1946, but that Act also requires that the charging party serve a copy of the charge upon the person against whom the charge is made, "unless the person aggrieved thereby was prevented from filing the charge by reason of service in the armed forces." Section 10(b), 29 U.S.C. § 9(c).

Congress adopted Title VII of the Civil Rights Act of 1964 less than 20 years after it adopted the NLRA. While it borrowed those words "charge" and "individual aggrieved," however, Congress chose not to place the responsibility for making service on the employee or other person aggrieved as it had done under the NLRA.

Congress chose instead to provide that "the Commission shall serve a notice of the charge . . . upon the employer . . . within ten days . . . and shall make an investigation thereof." Section 706(b), 29 U.S.C. § 2000e-5(b).

Similarly, in the ADEA, Congress limited the responsibility of a person filing a timely "charge

alleging unlawful discrimination with the EEOC." Section 7(d), 29 U.S.C. § 628(d)(1), and then waiting for at least sixty (60) days before filing suit. Under the ADEA, the "Commission shall promptly notify all persons named in the charge as prospective defendants . . . and shall promptly seek to eliminate any unlawful conduct practice by informal means. . . ." Section 7(d), 42 U.S.C. § 628(d)(1).

To argue that the aggrieved individual or charging party has the duty to notify the employer of the filing of the charge is contrary to the plain language of the ADEA as quoted above which places that responsibility on the "Commission".

Prior to the 1978 amendments to the ADEA, the Act stated "No civil action may be commenced by an individual under this section until the individual has given the Secretary not less than sixty days notice of an intent to file such an action." *Oscar Mayer & Co. v. Evans*, *supra*, 441 U.S. at 762, fn. 9. As originally enacted by Congress in 1967, the ADEA provided that a suit could not be commenced "by an individual under this section until the individual has given" at least 60 days notice to the Secretary of Labor of his intent to sue. Pub. L. No. 202, 81 Stat. 602, 605 (1967).

In 1978, Congress sought to facilitate the ability of individuals to bring suit once an employee has filed a charge and waited for the time specified in the law before filing suit. In that year, Congress removed the requirement that the individual bringing suit must

file a notice of intent to sue, and in its place adopted the current language of the ADEA that provides that a suit may not be brought until 60 days after "a charge alleging unlawful discrimination has been filed. . . ." Pub. L. No. 95-256, Section 4(1), 92 Stat. 189, 190 (1978).

In adopting that amendment, Conference Report on the 1978 Amendment (March 14, 1978) noted H. R. Conf. Rept. 965 at 8 that :

> . . . the conferees intend that the charge requirements will be satisfied by the filing of a written statement that identifies the potential defendant and generally describes the action believed to be discriminatory.

Congress noted that "Failure to timely file notice [of intent to sue was] the most common basis for dismissal of ADEA law-suits" and the purpose of the amendment was "to make it more likely that the courts will reach the merits of the cases of aggrieved individuals . . . " S. Rep. No. 493, 95th Cong. 1st Sess. 12 (1977), U.S. Code Cong. & Admin. News 1978, 504, 515.

By grafting the charge language of Title VII onto the ADEA – without the notice to employer requirements of the NLRA – Congress made it clear that the 1978 Amendment to § 626(d) was not intended to define a "charge" by its success in causing notice to the employer. By referencing the minimal standards of the Title VII charge regulations, the Conference

Report lends strong support for the Commission decision to adopt similar standards under the ADEA.

Indeed, the scheme of the ADEA offers even less reason than Title VII to impose a formalistic standard for the filing of charges. Under the ADEA there is no definition of the word "charge" in Section 11, 29 U.S.C. § 630 or elsewhere in the text of the Act. See 29 U.S.C. § 626(d) and (e); see also *Diez v. Minnesota Min. and Mfg. Co.*, 88 F.3d 672 (8th Cir. 1996), relied upon by Federal Express below (Brief of Appellee 22-23, and 29-30), and here (Brief at 21 and 28). Similarly, there is no definition of charge in Title VII. See *Edelman v. Lynchburg College, supra*, 535 U.S. at 112.

Title VII requires verification of a charge, Section 706(e)(1), 42 U.S.C. § 2000e-5(e)(1).

> Unlike Title VII, the ADEA does not require that a charge be verified. The only statutory reference to what might be necessary to be a charge comes in 29 U.S.C. 633(b). . . . Section 633(b) at least implies that charges in general shall be subject only to the minimal requirements that they be written and signed statements of the relevant facts.

Diez v. Minnesota Min. and Mfg. Co., 88 F.3d 672, 676 (8th Cir. 1996).

Title VII requires a "right to sue" letter before a private action can be filed. 42 U.S.C. § 2000e-5(f)(1). The ADEA has no such requirement. See, Section 7(d) 29 U.S.C. §§ 626(d) and (e). Moreover, the ADEA has

a provision that while the Commission may bring suit to enforce the Act "the right of any person to bring such action shall terminate upon the commencement of an action by the . . . Commission to enforce the right of such employee under this chapter." Sections 7(c)(1), 626(c)(1). In contrast, under Title VII, the person or persons aggrieved shall have a right to intervene in a civil action brought by the Commission or the Attorney General . . . Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1). The need for action by the Commission under the ADEA is thus less than under Title VII.

"The purpose of the charge filing requirement is fully served by an administrative claim that alerts the EEOC to the nature and scope of the grievance . . . " *Tolliver et al. v. Xerox Corp.*, 918 F.2d 1052, 1056 (2d Cir. 1990), *cert. den.*, 499 U.S. 983. For EEOC is the agency that can file suit to enforce the claims of employees of private employers and providing EEOC with such notice assures that the private suit will not be rendered unnecessary by a suit by EEOC.

Under the ADEA, the only responsibility that Congress has placed on the aggrieved individual is to file a timely written or oral complaint with the Commission or an agent of Commission, Section 7(d), 29 U.S.C. § 626(d). Under the ADEA, as under Title VII, the responsibility of notifying the parties and attempting to eliminate any unlawful practice is on "the Commission." 29 U.S.C. § 626(a). JA 347.

II. THE FAILURE OF THE COMMISSION TO NOTIFY FEDERAL EXPRESS PROMPTLY OF THE KENNEDY FILING DOES NOT LESSEN HER RIGHTS OR THE RIGHTS OF THE RESPONDENTS TO PROSECUTE THIS ACTION UNDER THE ADEA.

Federal Express argues here that no "charge" is filed unless the Commission duty "upon receipt of a charge" is "to promptly notify the persons named in such charge . . . and promptly seek to eliminate any unlawful practices." Brief on the Merits at 11-15. Under such a rule the determination whether a "charge" has been filed does not depend upon the content of the filing, but solely upon the Commission's compliance with its duty to act "upon receipt of a charge." Federal Express Brief at 11-15. The Brief states (at 11): "An intake questionnaire that does not yield notice an attempt at resolution cannot be a charge."

That argument is inconsistent with the language of the ADEA, inconsistent with this Court's decisions in *Love v. Pullman Co., supra*, 404 U.S. at 618-619; and with *Edelman v. Lynchburg College, supra*. The position of Federal Express quoted above is also inconsistent with the prior decisions of the Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits.[4] Indeed, the logic of that argument is that the

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[4] *LaQuaglia v. Rio Hotel and Casino, Inc.*, 186 F.3d 1172, 1175 (9th Cir. 1999).

regulation defining an ADEA "charge" by its content are unauthorized and unlawful because the regulation recognizes that after the charge is filed, the Commission must serve notice promptly. 29 C.F.R. § 16.

But in the Court of Appeals below, Federal Express explicitly declined to challenge the lawfulness of the Regulation, and did so again in its Petition. Accordingly, Federal Express cannot do so in its Brief on the Merits. And it does not assert the unlawfulness of the Commission's regulation under the ADEA in this Court.

Here, as in *Love v. Pullman Co., supra*, the employer made "no showing of prejudice to its interests." 404 U.S. at 619. Moreover, here as in that case,

> " . . . to require a second filing by the aggrieved party would serve no purpose other than the creation of another procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

Love v. Pullman Co., supra, 404 U.S. at 119.

Federal Express also argues that "Congress intended employers to have notice . . . " of the charges and the opportunity to reach a settlement with the charging party.

No doubt, but Congress conferred on the Commission to perform the statutory duties "promptly." There is no hint in the statute or in the legislative

history of Section 626(d) or in the legislative history of the ADEA's charge filing procedure that Congress believed that the charging party who has submitted a writing to EEOC with all of the information it needs or seeks under the Act, and in addition a five page Affidavit, should be deprived of her rights to bring suit because of the actions or inactions of the EEOC.

This Court and other appellate courts that have addressed the issue have ruled that the charging party should not be penalized because of the failure of the Commission to perform its duties under the Act and under its Regulations promptly. *Love v. Pullman, supra; LaQuaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 186 (9th Cir. 1999) (the right of a claimant is not dependent upon "scrupulous compliance [by EEOC] . . . otherwise, claimants with meritorious claims might be denied relief as a result of bureaucratic mix-ups", citing *EEOC v. Techalloy Maryland, Inc.* 894 F.2d 676, 679 at fn. 4 (4th Cir. 1990); *Edelman v. Lynchburg College,* 300 F.3d 400, 404-405 (4th Cir. 2002).

The Eleventh Circuit in *Bost v. Federal Express, supra*, 372 F.3d at 1239-1240, acknowledged the existence of the Commission's regulation. 372 F.3d at 1238-39. However, that Court did not set forth any reason for believing or suggesting that Commission's regulation, 29 C.F.R. § 1626, was inapplicable or invalid. 372 F.3d at 1240-1241. In so granting the motion to discuss under Rule 12(b)(6), it relied upon the "undisputed evidence" and the "manifest intent" standard, before permitting any discovery. 372 F.3d at

1240-1241. Nor did that decision discuss why the "relation-back" portion of the regulation, 29 C.F.R. § 1626.8(b), of the regulation should not cure any defect in the charge filed by *Bost*.

That decision was based in part upon the view of the Eleventh Circuit that "The ADEA requires that an individual exhaust available administrative remedies with the EEOC before filing suit." 372 F.3d at 1238. That decision preceded the ruling of this Court in *Woodward v. Ngo,* 126 S. Ct. 2378, 2390-91 (2006), which noted the charge filing provision at issue of the ADEA and Title VII did not require exhaustion of administrative remedies.

A ruling that a charging party's statutory right is barred or diminished because of the unexplained or arbitrary failure of a government agency to perform its statutory duties promptly would raise a serious question of constitutional law. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 434 (1982); *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 485 (1988). There should be no such issue here, because the intent of Congress was to authorize an individual to file suit after filing of a "charge" and authorized the Commission to issue lawful regulations, and the applicable regulation issued by the Commission is controlling and governing.

Indeed, in the Court of Appeals below, Federal Express noted that " . . . FedEx has never argued that the EEOC's failure to treat a questionnaire as a charge – standing alone – is dispositive . . .

treatment by the EEOC may be beyond a plaintiff's control." Brief of Federal Express as Appellee, at 23, n. 17. It then added "Here however, the record shows no proof that Kennedy took any action to activate the EEOC's machinery and she therefore cannot complain . . . " *Id.* In this case, Federal Express filed a motion to dismiss before filing an Answer, and the district court granted that motion before Answer, and therefore before discovery.

That position of Federal Express in this Court not only fails to recognize that as Appellee in the Court of Appeals below, Federal Express was seeking to affirm an order that granted a motion to dismiss under Rule 12 and that a

> . . . court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts consistent with the allegations . . .

Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); and *Swierkiewicz v. Sorema, NA,* 534 U.S. 506, 514 (2002).

Federal Express also fails to recognize that Respondent Kennedy filled out completely and signed a two page questionnaire which itself contained more information than required by the EEOC. She also typed and had notarized a five page detailed Affidavit stating the surrounding facts in even more detail and sent it to EEOC. In addition, in February, 2002, after about 60 days of apparent inaction by EEOC, she executed the completed Questionnaire again on

February 3, 2002 and sent it again to EEOC. Ms. Kennedy presumably did not ask for a Form 5 charge in 2001, because she was a layperson who was not familiar with the forms used by EEOC in 2001 and 2002.

Federal Express states in its Brief (fn. 10) that "Congress structured the ADEA so that EEOC will play a significant role in preventing and resolving claims of age discrimination. . . ." The EEOC does play a critical role, both by promulgating regulations setting forth the procedures to be followed, but also by seeking conciliation where feasible, and by bringing suits of its own.

EEOC attempts to resolve such claims within the 60 days set forth in the language of the Act. But Congress expressly granted private parties the right to bring suit after the 60 day period has expired, because it recognized that there are many charges which the Secretary of Labor could not, or did not wish to pursue and the EEOC cannot or does not wish to pursue in court, which cannot be resolved within that limited period of time, given the quantity of charges it receives and its limited budget. Unlike Title VII, in which an employee usually needs to receive a right to sue letter before bringing suit, the ADEA requires nothing of the agency except that it notify the employer or other respondent of the filing of charge. Its failure to do so promptly cannot and should not be attributed to any action or failure to act on the part of the charging party who filed a timely

charge under the plain language of the Regulation of EEOC. 29 C.F.R. § 1626; 29 U.S.C. §§ 626(c) and (d).

Contrary to the assertions in the Brief of Federal Express, Section 7(d) of the ADEA does not require the charging party or other prospective plaintiff to file any document of her or his own after others have filed a charge, but only requires that "No civil action may be commenced until 60 days after a charge has been filed." 29 U.S.C. § 626(d). It also provides that such a suit in New York and other states that have laws prohibiting age discrimination should not be filed "'before the expiration of 60 days *after proceedings have been commenced* under the State law.'" *Woodford v. Ngo,* 126 S. Ct. 2378, 2390 (2006) (italics as in that decision).

The ADEA permits non-filing employees to bring or join in a suit although they did not file a charge. Accord: *Tolliver et al. v. Xerox Corp.,* 918 F.2d 1052, 1057 (2d Cir. 1990).

By providing in the text of the ADEA, as incorporated from the Fair Labor Standards Act, 29 U.S.C. § 216(b) that "'employees may sue on behalf of . . . themselves and others similarly situated' . . . Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively." *Hoffman-La Roche, Inc. v. Sperling, et al.,* 493 U.S. 165, 169 (1989).

> A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of

> resources. The judicial system benefits by efficient resolution in one proceeding of common issues of fact and law arising from the same alleged discriminatory activity.

This suit was properly brought to obtain those benefits to the Respondents and to the judicial system. There was and is nothing inconsistent with the intent of Congress in so doing.

The Brief of Petitioner cites the legislative history of the ADEA in 1967. Brief of Petitioner Federal Express at 12-15. Even prior to 1978, this Court had recognized that the defaults of state governmental agencies do not bar the claims of an individual to bring suit under the ADEA. *Oscar Mayer & Co.,* 441 U.S. 750, 662 (1979). Similarly, this Court had earlier ruled that delays by the Commission do not bar the right to prosecute a suit to enforce Title VII. *Love v. Pullman, supra.*

The language and intent of the Congress in 1977 and 1978 about charge filings are critical to the issue presented in this case because the ADEA did not use the word "charge," prior to that time.

As noted above (see page 27), the charge filing provisions of the ADEA added to the Act by the 1978 amendments to the Act were adopted in March, 1978. Pub. L. 95-256, 92 Stat. 3781. See, *Oscar Mayer & Co. v. Evans, supra,* 441 U.S. at 764, fn. 11, citing *Love v. Pullman Co., supra.*

Congress adopted the 1978 Amendments in March of that year. 92 Stat. 3781. Congress utilized

the Title VII charge filing procedure, with several significant modifications, all of which appear meant to maximize the chances that lay persons could file a charge without the need to obtain the advice of counsel.

Congress noted that "Failure to timely file the notice [of intent to sue] . . . was the most common basis for dismissal of ADEA law-suits by private individuals." Sen. Report 493, 95th Cong., 1st Sess., 12 (1977). It noted that the purpose of the amendment was "to make it more likely that the courts will reach the merits of aggrieved individuals." *Id.*

Petitioner argues without supporting relevant data that EEOC's work load would increase if a Form 283 charge of the kind filed by Respondent Kennedy is a charge within the meaning of the regulations.

It does not compare the number of charge filings per year before 1983 or so when current regulations under the ADEA were adopted with earlier years when those regulations did not exist. Instead it conjectures "that since 1997, EEOC has processed between 75,000 and 80,000 charges per year, which, one may surmise, is a small fraction of the number of completed intake questionnaires and other inquiries the agency receives each year." Brief at 22. By inclusion of the words "other inquiries" Federal Express is mixing charges and non-charges. Such a non-comparison is useless.

Nothing in this record shows or suggests that treating the intake questionnaire as a charge will

allow for slower processing of the charge, with notice to the employer or other respondent. On the contrary, once the law is clarified by a ruling of this Court, the Commission will accept the documents as charges, which is likely to lead to earlier notification of the employer. Moreover, continued recognition by this Court of the opt-in procedures of the ADEA will lead to more suits by groups of older plaintiffs, with the increased judicial efficiency described in *Hoffman-La Roche v. Sperling, et al., supra,* 493 U.S. at 170.

A procedure of the ADEA that was modeled upon and based on the Fair Labor Standards Act, namely the procedure that any person aggrieved by the same or similar alleged discriminatory conduct of the employer may join a suit without payment of fees by "opting in" to it. See, Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which is incorporated by Section 7 of the ADEA, 29 U.S.C. § 626(b). That provision specifies that "No employee shall be a party plaintiff unless he gives his consent in writing to become such a party, and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b), incorporated by 29 U.S.C. § 626(b). *Hoffman-La Roche v. Sperling, supra.*

The charges filed by Kennedy in December 2001 and February 3, 2002 stated expressly that "Fed Ex began to target me and other more senior and older employees . . . Federal Express continues to grant preference to young employees . . . Older couriers are disciplined or threatened with discipline for minor or invented infractions . . . while younger workers

engage in such conduct without issue. . . ." JA 389. Suit was filed on behalf of the fourteen plaintiffs and "others similarly situated." JA 29-30.

In this case Kennedy could have joined the suit filed by Robertson and McQuillan as a matter of statutory right. 29 U.S.C. §§ 216(b) and 626(b). However, given that she had provided a writing containing all of the information sought by EEOC in a charge more than 150 days before the suit was filed, she had a right to participate in the collective action as an original party plaintiff because she served her Affidavit Form 28 on EEOC in December 2001 and her Form 283 again on EEOC in early February, 2002, and the suit was not filed until May 30, 2002. JA 265 (2 pages, fold out); and JA 389.

III. IN ANY EVENT THE COURT OF APPEALS PROPERLY CONCLUDED THAT "THE EEOC ERRED IN FAILING TO ACT IN RESPONSE TO KENNEDY'S MANIFEST INTENT."

The Opinion of the Court of Appeals below (Pet. App. 4a-23a) expressly adopts the "manifest intent" test used by several courts of appeal that was urged below by Federal Express. Brief of the Appellee at 21-25. Holowecki et al. as Appellants below argued that "the 'manifest intent' approach is contrary to the governing language of EEOC and to the intent of Congress and . . . is contrary to law." Brief of Appellants at 29. Appellants argued however, that if the

Court were to accept that theory, " . . . Kennedy stated her claim in a manner and desire to complain to EEOC about Federal Express's conduct toward her . . . and to seek the assistance of EEOC in obtaining relief as soon as possible" and that she " . . . . exposed herself to retaliation as surely as if she had filed suit against that company." Brief of Appellants at 29-30.

Respondents Holowecki et al. adhere to the position below and they urge this Court to give full effect to the valid regulation of the EEOC by reviewing the adequacy of the information contained in the initial document, and holding that the Kennedy filing of December 2001 constitutes a charge. 29 C.F.R. §§ 1626.6 and 1616.8(b).

Under that Regulation no further intent need be shown, because if the initial document received by EEOC has the information required by the Commission in 29 C.F.R. §§ 1626.6 and 1626.8(b), no additional information is needed by EEOC to perform its duties promptly. See *Tolliver et al. v. Xerox Corp.*, 918 F.2d at 1056.

In the Court of Appeals below, Federal Express urged "acceptance of the 'manifest intent' test." Federal Express now acknowledges that such a "test . . . is an invitation for mischief and . . . too unclear to be workable." Brief of Federal Express on the Merits, 29-31. Federal Express had also urged the Eleventh Circuit to accept the "manifest intent" test in *Bost, et al. v. Federal Express Corp.*, 372 F.3d 1233 (11th Cir. 2004), and that court did so.

In its Brief on the Merits, Federal Express now urges this Court to reverse the decision of the court of appeals below because it followed the "test" of "manifest intent" although Federal Express argued to the court of appeals below as the appropriate standard. This Court should reject the argument of the Petitioner who urges a theory or standard upon the Court of Appeals, but then asks this Court to reverse the Court of Appeals below because that court followed that standard, but applied it in a manner contrary to Petitioner's intent.

CONCLUSION

For the reasons set forth above, this Court should rule that the procedural regulation of the Commission under the ADEA, 29 C.F.R. § 1626, is valid and controlling as to when a writing is a charge for purposes of the ADEA and should affirm the judgment below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Federal Express Corporation,

Petitioner,

v.

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, Nancy Trompics, individually and on behalf of all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement contained in the Petition for Writ of Certiorari, Pet. iii, remains accurate. *See* SUP. CT. R. 24.1(b), 29.6.

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The Court should reject the bold invitation of both Respondents and the Government to jettison the congressional mandate of pre-litigation notice to employers of discrimination claims under the Age Discrimination in Employment Act ("ADEA"). The ADEA explicitly provides a framework for employers and employees to resolve disputes informally through the EEOC. The only way for that process to begin is through notice to the employer that its employee is charging it with discrimination. Notice is such a fundamental element of the ADEA that ignoring it, as Respondents and the Government do, unfairly and impermissibly distorts the careful balance of interests drawn by Congress in the text of the ADEA.

Respondents offer a definition of charge that completely ignores the notice component and permits an employee to bypass the informal resolution process altogether. The Government's proposal permits a document to morph into a charge at some indefinite time after its receipt—especially if no later document is timely filed—and, accordingly, permits the requirement for prompt notice to be jettisoned. Neither proposition survives analysis under the ADEA. Both ignore the inescapable fact that the text of the statute makes notice and opportunity for conciliation essential elements of the charge process. Without those elements, the employer is forever deprived of its opportunity under the ADEA to avoid litigation, a result that cannot be squared with the text and purpose of the statute or the legitimate needs of employees, employers, or the EEOC. Notice to the employer and efforts to achieve informal resolution of claims are central to the statutory scheme, and a charge without notice cannot be the predicate for litigation under the ADEA.

Requiring notice as a precondition to litigation is a clear and definite rule that conforms to the text of the statute and regulations and effectuates the central purposes of the ADEA. Existing doctrines of equitable tolling of charge-filing requirements amply safeguard the interests of employees who have diligently sought to protect their right to sue under the ADEA. Nothing more is required to protect employees from potential governmental errors in the processing of charges of discrimination under the ADEA.

I. THE TEXT, STRUCTURE, LEGISLATIVE HISTORY, AND PURPOSE OF THE ADEA REQUIRE PROMPT NOTICE TO THE EMPLOYER.

Both Respondents' and the Government's positions ignore the explicit requirement of notice to the employer in the ADEA. Congress viewed notice and the consequent opportunity for conciliation as a central part of the legislation when the ADEA was originally adopted and reaffirmed their importance in later amendments to the statute. Notice and conciliation allow the parties to accomplish an essential purpose of the ADEA: to identify and to prevent age discrimination without costly and time-consuming litigation. This Court should reject the requests of Respondents and the Government to allow employees to proceed directly into litigation without any prior notice to, and therefore without any possibility of conciliation with, the employer.

A. A charge has no function without notice to the employer.

Congress created the ADEA as a mechanism by which employees can raise claims of age discrimination with their employers and seek informal resolution of those claims: as the statute recites, "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The reasons to encourage informal resolution are evident. Litigation is costly to both parties, especially when the dispute is not addressed in a timely manner, and avoidable litigation unnecessarily burdens courts. And, of course, a mutually-satisfactory resolution is superior to the uncertain outcome of a trial. Thus, notice followed by an opportunity for informal resolution benefits both employers and employees.

Only if this informal process is unsuccessful—after a minimum effort period of sixty days—did Congress intend to entitle an employee to file a lawsuit and progress to the more formal resolution of litigation. *See* 29 U.S.C. § 626(d). The EEOC's regulations acknowledge the conciliation process and its role in the statutory scheme:

> Upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion. Upon failure of such conciliation the Commission will notify the charging party. Such notification enables the charging party or any person aggrieved by the subject matter

> of the charge to commence action to enforce their rights without waiting for the lapse of the 60 days.

29 C.F.R. § 1626.12. A charge, therefore, involves the informal process that *must* occur before an employee can proceed to the formal process of litigation, and the informal process *cannot*, by definition, occur without the participation of the employer.

The Government does not dispute the requirement or purpose of notice to the employer. Instead, it responds that "the notice and conciliation requirement serve different objectives than the charge-filing requirement," U.S. *Amicus* Br. 7, but it does not state what different objective the charge-filing requirement could possibly have. Without notice that an employee has raised a claim of age discrimination, an employer cannot attempt voluntary resolution or make remedial efforts. Without notice to the employer, the EEOC cannot mediate a settlement of the claim. Without notice, *nothing* can take place to address an employee's concerns about her claim of age discrimination informally.[1] If this is what Congress

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[1] Respondents incorrectly argue that an employee has no obligation under the ADEA other than to file a document with minimal contents and wait sixty days to file a lawsuit. While an employee is not obliged to serve her employer with notice of her filing, she may not simply abdicate any responsibility for monitoring the EEOC's processing of a charge. The language of the statute—"conciliation," "conference"—and the context of the ADEA's informal resolution process—cooperation, mediation—place a charging party on notice that she is an integral part of the process. That is why courts have found it appropriate to

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intended, then the sixty-day waiting period has no meaning. Indeed, if an opportunity for informal resolution is not a pre-condition to private litigation, then the charge- filing requirement has no meaning.[2] Notice is paramount to the essential purpose of the ADEA, and without it there is no "charge" within the meaning of the statute.

B. The 1978 amendments to the ADEA reaffirmed the requirement of notice to the employer.

Respondents place great emphasis on the 1978 amendments to the ADEA, through which they claim "Congress sought to facilitate the ability of individuals to bring suit." Resp. Br. 27. While Congress made changes to the ADEA's procedure to permit more claims to be decided on their merits rather than being dismissed on procedural grounds, the history of the amendments belies any desire to rush employees to the courthouse and bypass the EEOC and its informal resolution

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impose on the employee the burden of proving that equitable tolling of the charge-filing requirement is warranted. *See infra* Section III.B. That rule provides incentives for employees to communicate with the EEOC throughout the charge-filing process.

[2] As the Government notes, the initiation of a public enforcement action under the ADEA does not even require a "charge"; only a "complaint" is necessary. *See* U.S. *Amicus* Br. 14 n.5; *see also infra* note 11 (noting that "charge" and "complaint" differ only in function). Thus, the only conceivable function of a charge, as opposed to a complaint, is the opportunity to avoid private litigation through notice and conciliation.

process. To the contrary, the 1978 amendments demonstrate Congress' increased desire to avoid litigation by ensuring a greater opportunity for early involvement by the EEOC and employers.

In 1978, Congress was concerned about the short time frame—180 days from the alleged discrimination—within which the notice of intent to sue then required by the ADEA had to be filed. *See* S. Report No. 95-493, at 12 (Oct. 12, 1977). The Senate felt that 180 days was too short a time in which to require an employee to file such a notice because employees often have not decided whether to sue within that brief period. *See Hiscott v. Gen. Elec. Co.*, 521 F.2d 632, 634 (6th Cir. 1975) (the Senate criticized this case, where an employee's ADEA suit was dismissed because, although he had filed information alleging discrimination with the EEOC within 180 days, he had not indicated a specific intent to sue); *Powell v. Sw. Bell Tel. Co.*, 494 F.2d 485 (5th Cir. 1974) (same). Moreover, because courts were treating the 180-day period as jurisdictional, they were refusing to allow equitable modifications to it. *See* 123 Cong. Rec. 34294, 34296 (Oct. 19, 1977) (remarks of Sen. Williams); *see, e.g.*, *Hiscott*, 521 F.2d at 633–34. Thus, if an employee missed the 180-day limit for filing notice of intent to sue, he was forever barred from suing, regardless of whether he had a good excuse for missing the deadline.

In response to these concerns, the Senate wanted to eliminate the 180-day requirement altogether, while retaining the notice-of-intent-to-sue and the 60-day waiting period requirements. *See* S. Report No. 95-493, at 25 (Oct. 12, 1977). In conference, however, the Senate's proposal was rejected, and the final amendment simply

changed the statute from requiring a "notice of intent to sue" to requiring a "charge." *See* 124 Cong. Rec. S4449 (Mar. 23, 1978) (remarks of Sen. Williams). This change effectively overruled cases like *Hiscott* and *Powell* by allowing employees to meet the 180-day requirement by giving information to the EEOC in the form of a "charge," without having to decide at that early juncture whether they intended to sue. At the same time, the purpose for the notice requirement—early EEOC involvement and attempts at conciliation—was still fulfilled. *See* 124 Cong. Rec. H2269, 2272 (Mar. 21, 1978) (remarks of Rep. Quie). Thus, "the compromise d[id] not upset the balance of interests struck by the original act." *See id.*

Accordingly, the 1978 amendments to the ADEA do not support Respondents' argument. Instead, the compromise struck in 1978 shows a continued congressional commitment to the statutory scheme of the ADEA, whereby prompt notice and attempts at conciliation occur before suit.[3]

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[3] By contrast, both Respondents' and the Government's arguments show a lack of commitment to the informal process. In fact, the Government assumes that litigation is inevitable, as shown by its proposed remedies for employers who received no notice, such as a mere stay of litigation or a limitation on adverse inferences from an employer's pre-notice destruction of documents. U.S. *Amicus* Br. 28. This assumption highlights why a system that requires no notice to the employer runs contrary to the ADEA's purpose of facilitating informal resolution.

C. The distinctly different pre-litigation requirements under Title VII illustrate why a charge under the ADEA must include notice to the employer.

Respondents borrow much of their argument from Title VII history and analogy. In doing so, they ignore a crucial difference in the statutory schemes relevant to the issue of notice to the employer. Under Title VII, an employee cannot file a lawsuit until she has received a Notice of Right to Sue from the EEOC indicating that the informal process has concluded. 42 U.S.C. § 2000e-5(f)(1). In order to issue such a notice, the EEOC must have opened a case, assigned a charge number and, most importantly, informed the employer about the employee's claims. In virtually every case under Title VII, therefore, the employer has received notice of the claims.

Under the ADEA, on the other hand, an employee need not wait to receive a Notice of Right to Sue before filing suit. The statute allows an employee to file a lawsuit after a sixty-day period for informal resolution efforts. *See* 29 C.F.R. § 1626.12 (expressing the EEOC's intention to complete notice and conciliation efforts well within sixty days). If submissions that do not result in notice to the employer are deemed to be charges and allow employees to proceed directly to litigation, the sixty days of informal resolution will not occur—a result not intended under this statutory framework. The employer would thus lose the opportunity to avoid a public and costly lawsuit. The employer also may not be warned early enough to preserve and protect the records necessary to defend the claim or to interview witnesses

who might be unavailable later. *See Edelman v. Lynchburg College*, 535 U.S. 106, 119 (2002) (noting and leaving open on remand "the significance of the delayed notice to the [employer]").

Title VII's notion of "charge" therefore does not translate fully to a discussion of a charge within the meaning of the ADEA. Because the ADEA lacks Title VII's additional statutory procedures guaranteeing notice as a matter of course, it is even more important to enforce strictly the notice requirement contained in § 626(d). The arguments of Respondents and the Government fail to account for this difference between Title VII and the ADEA, resulting in proposed rules by each that do not satisfy the text or purpose of the ADEA.

II. A DOCUMENT MUST RESULT IN PROMPT NOTICE TO THE EMPLOYER TO SATISFY THE STATUTORY REQUIREMENTS FOR A CHARGE.

Neither the statute nor the EEOC's regulations set forth an explicit definition of a "charge" under the ADEA.[4] Petitioner, Respondents, and the Government have proposed various rules of law regarding what constitutes a charge under the ADEA. Only Petitioner's proposed rule is faithful to the actual text of the statute as well as the legislative history and stated purpose of the ADEA.

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[4] The only regulation that purports to state what the term "charge" means is so minimalist that neither Respondents nor their *amici* contend that it, by itself, is sufficient. *See infra* note 11 and accompanying text.

A. Petitioner's position is the only one that gives effect to the text and purpose of the ADEA.

A charge under the ADEA is a document that provides prompt notice to the employer about an employee's claim of age discrimination and initiates the informal resolution process. This definition is the only one that is consistent with the language of the statute as drafted by Congress, 29 U.S.C. § 626(d); the regulations promulgated to implement the statute, *see* 29 C.F.R. §§ 1626.11, 1626.12; and current guidance from the EEOC Compliance Manual, *see* U.S. *Amicus* Br. 21 ("[T]he EEOC Compliance Manual has for a number of years directed staff to treat any qualifying submission as a charge and provide notice to the employer."). More fundamentally, it is the only concept of "charge" that Congress intended to carry out its design for informal resolution, *see* Pet. Br. 12–15; Section I *supra*; *see also Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").[5]

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[5] Petitioner acknowledges that there may be the rare case when an employee has diligently pursued her rights but is nevertheless unable to timely satisfy the charge-filing requirements of § 626(d) because of inaction by the EEOC. As discussed in Section III.B *infra*, the existing doctrine of equitable tolling sufficiently protects employees from unfairness in these rare circumstances. Such doctrines are inapplicable in this case, however, as the EEOC's inaction as to Kennedy's intake questionnaire did not prevent Kennedy from filing a timely charge of discrimination. *See infra* note 13.

B. The Government's proposal to define a charge based on "intent" is a convenient litigating position that is contrary to the statute, inconsistent with prior positions of the EEOC, and unworkable in application.

The Government argues that notice to the employer—present in both the plain language of the statute as well as the EEOC's regulations—is not necessary, and instead focuses on the intent of the person submitting the document—a factor found in neither the statute nor the regulations. This "intent" argument is so fundamentally flawed that it is fairly characterized as a convenient litigating position that is designed, for this case, to rescue Kennedy from her intake questionnaire's failure to satisfy § 626(d), and, for this case and others, to give the EEOC unbridled freedom to declare if and when a document is a charge. The Government's argument jettisons notice and conciliation, the fundamental functions of a charge. It also does not represent a consistently held position of the EEOC and is based on neither EEOC interpretive regulations warranting deference nor an EEOC interpretation of the statute that is sufficiently faithful to warrant deference. Finally, the Government's position will produce unreliable and manipulable results. It should be rejected for all these reasons.

1. The Government's argument should be rejected because the EEOC itself has been inconsistent regarding whether intent is required for a charge.

Respondents and the Government accuse Petitioner of attacking the EEOC's regulations either directly or indirectly. The EEOC's regulations, taken as a whole, are not incompatible with the ADEA, however. The regulations clearly require prompt notice to the employer, 29 C.F.R. § 1626.11, and "informal methods of conciliation, conference and persuasion," *id.* § 1626.12. If those methods are unsuccessful, the regulations provide that an employee can file suit without waiting the full sixty days. *Id.* The issue is not the content of the regulations. Rather, it is the EEOC's proposed practice of not following the regulations, adding an intent requirement, and deleting the notice requirement—and, even worse, attempting to do so retroactively.

The Government's concession of an "admittedly uneven past practice in processing submissions at the field office level," U.S. *Amicus* Br. 8, is a modest one. In fact, the Seventh Circuit sharply criticized the EEOC for this inconsistency more than nineteen years ago. *See Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 544 (7th Cir. 1988). The *Steffen* court found that "[t]he inconsistencies between . . . how the EEOC treats Intake Questionnaires in practice[] and what [it] argues on appeal have led to a situation that is unfair to both employees and employers." *Id.*

Unfortunately, the EEOC's position is just as inconsistent today. The February 21, 2002 memorandum

included in the Government's brief was not only written after Kennedy first submitted her intake questionnaire, but also fails to establish any criteria by which a field agent might determine an employee's intent. U.S. *Amicus* Br. 4a–5a. Even as late as 2006, the EEOC did not argue that intent is required for a charge. U.S. *Amicus* Br. 17 n.8. The EEOC's August 13, 2007 memorandum reverses this position and indicates that an employee's intent should be considered, but the criteria for determining intent remain unclear. U.S. *Amicus* Br. 6a–7a. Notably, both the 2002 and the 2007 memoranda were issued shortly after this Court had granted certiorari in cases where the EEOC had not initially deemed the document at issue to be a charge—the August 2007 memorandum after the Court agreed to hear this case, and the February 2002 memorandum after the Court agreed to hear *Edelman v. Lynchburg College*, 533 U.S. 928 (June 25, 2001) (granting certiorari). This fact casts doubt on the Government's contention that its current argument is not just a "convenient litigating position." U.S. *Amicus* Br. 22; *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

Nor has the EEOC maintained a consistent public position about the role of "intent" in meeting the charge requirements. For two and a half years before September 18, 2007, the EEOC website indicated in "Frequently Asked Questions" that a charge is filed "when the completed, signed Form 5 is received back in the EEOC field office and a charge number has been issued." U.S. *Amicus* Br. 18 n.9. In response to this lawsuit, the EEOC has apparently added a sentence noting that an "intake questionnaire . . . can also constitute a charge

. . . if it contains all the information required by EEOC regulations governing the contents of a charge and constitutes a clear request for the EEOC to act." *Id.*; *see* U.S. Equal Employment Opportunity Comm'n, *FAQs* (visited Oct. 25, 2007) <https://eeoc.custhelp.com/cgi-bin/eeoc.cfg/php/enduser/std_alp.php?p_sid=r9xBKEAh&p_lva=&p_sp=&p_li=>. Yet, confusingly, the sentence "Your charge is filed when the completed, signed Form 5 is received back in the EEOC field office," remains. *Id.*

In addition, the EEOC has promulgated intake forms that only muddy the waters further by stating that they are charges when they are "the only timely written statement of allegations of employment discrimination." U.S. *Amicus* Br. 3 n.2. In other words, one of these new documents may not be a charge when filed, but can later become a charge if no Form 5 "Charge of Discrimination" is submitted and, as a result, the intake questionnaire must be treated as a charge to preserve an employee's claim. Of course, in many instances, that determination cannot be made until long after the intake questionnaire was submitted, such that "prompt" notice and conciliation—the essential functions of a charge—cannot occur. Moreover, no approach could be further divorced from any notion of "intent." The EEOC has attempted to refine the procedure so that consistent compliance with the statute is impossible.

2. The Government's argument should be rejected because the inconsistent and extra-regulatory positions of the EEOC are not entitled to deference.

The changing positions of the EEOC should be given no deference for two reasons. First, they have been so inconsistent over time that they should not be deferred to as established "interpretations" of the statute or the regulations. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257–58 (1991) (declining to defer to an EEOC interpretation that "has been neither contemporaneous with its enactment nor consistent since the statute came into law"); *Pub. Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989) (refusing to give deference to EEOC interpretation of ADEA), *superseded on other grounds by* Pub. L. No. 101-433, 104 Stat. 978 (Oct. 16, 1990). The agency cannot flatly rewrite the regulations with guidance memoranda, or even its Compliance Manual, and then claim deference to its "interpretation." *See Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162, 2177 n.11 (2007) (declining to defer to the EEOC's Compliance Manual or adjudicatory positions).

Second, the EEOC's unilateral injection of intent into the statutory and regulatory scheme and its deletion of the notice requirement is so far removed from the purpose of the ADEA that it should be afforded no deference. As discussed above, notice to the employer is paramount to the ADEA's purpose of preventing and eliminating age discrimination by informal means. Replacing notice to the employer with an amorphous intent requirement defeats this purpose. "No deference . . . is due an agency interpretation that is inconsistent

with the language of the statute, contrary to the statute's intended effect, arbitrary, or otherwise unreasonable." *Parisi by Cooney v. Chater*, 69 F.3d 614, 617 (1st Cir. 1995); *see Homan & Crimen, Inc. v. Harris*, 626 F.2d 1201, 1211 (5th Cir. 1980) (citing *Morton v. Ruiz*, 415 U.S. 199 (1974) ("Because the agency's interpretation is inconsistent with the congressional purpose, it is entitled to no deference and in fact must be rejected.")).

3. The Government's argument should be rejected because its "intent" rule will result in inconsistent determinations of what constitutes a "charge" and is subject to manipulation.

Even if the substitution of intent for notice and conciliation was a consistently maintained position of the EEOC that could be squared with the statute, which it is not, the Government's argument for an intent-based rule would fail because it is so unreliable in its execution. While the test is posed as objective, it is actually profoundly subjective. While the test is posed as giving employees control, it actually gives unassailable interpretive discretion to the EEOC. While the test is posed as a means of avoiding inconsistent treatment of similar documents, in reality it virtually guarantees such inconsistent treatment. Moreover, regardless of how it is posed, the test is inherently amenable to manipulation. For these reasons, this Court should reject the Government's proposed "intent" test.

a. *Subjectivity*

Although the Government asserts that its proposed test looks at "objective intent," the Government's failure to identify a single "objective" criterion for determining intent shows that its test is actually wholly subjective. Similarly, the Second Circuit determined intent based on the "forceful tone and content" of the attached affidavit—hardly an objective factor. And, even the most forceful tone is not probative of an intent to initiate notice and conciliation, but rather probative only of disgruntlement. Virtually every employee coming into an EEOC office will be sufficiently troubled by perceived discrimination at his workplace to compose a sharp narrative. Part of the role of the intake questionnaire is "pre-charge filing counseling," JA 265, in order to weed out the "catchpenny claims of disgruntled, but not necessarily aggrieved, employees." *Edelman v. Lynchburg College*, 535 U.S. 106, 115 (2002) (noting the burdens of responding to a claim of discrimination and the importance of some assurance—in that case, through verification—that employers need respond only to legitimate claims). The level of disgruntlement when a questionnaire is completed has no bearing on whether a document is a valid charge.

Perhaps due to the truly subjective nature of the inquiry it proposes, the Government actually frames its intent test in the negative. U.S. *Amicus* Br. 24 ("*Neither* the pre-printed intake questionnaire that respondent used *nor anything* respondent wrote on the form or in her affidavit *indicates that she did not intend* the submission to be a charge," and "*nothing* respondent wrote in her intake questionnaire or accompanying

affidavit manifests a belief that the December 3, 2001, submission is *not* a charge . . . .") (emphasis added). The question as the Government poses it, therefore, is whether the employee clearly expressed a *lack* of intent to file a charge. If not, then the submitted document is, in fact, a charge. This analysis rises to new levels of subjectivity, as it requires an EEOC field agent to review the document for what the employee did not write and to draw conclusions from what is not included in the document.

b. *EEOC, not employee, control*

The Government claims that Petitioner's position unfairly holds employees responsible for "conduct outside [their] control." U.S. *Amicus* Br. 7. Yet the Government's proposed rule does the same thing. It gives to its many field agents the duty of inferring intent from a submitted document, which, according to the 2007 guidance memorandum, they are free to do "from a plain reading of the correspondence." U.S. *Amicus* Br. 7a. The EEOC "does not make a determination whether a submission is a charge until it has reviewed the information and concluded that it meets the form and content requirements of its regulations and manifests the requisite intent." U.S. *Amicus* Br. 24. Whether or when an EEOC field agent reads an intake questionnaire to demonstrate "intent" is not in the control of the employee who submitted the document.[6]

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[6] Other parts of the process are also inherently out of the employee's control. For instance, oral allegations of discrimination made via telephone or in person can constitute a (Cont'd)

Kennedy's intake questionnaire aptly illustrates how the determination of "intent" is in the eye of the beholder. For instance, the Government finds evidence of Kennedy's "intent" from a checked box on her intake questionnaire that she had not "filed an EEOC charge in the past." U.S. *Amicus* Br. 23. A field agent reviewing the file could just as easily find a lack of intent from that checked box, however, because Kennedy re-executed and re-submitted the same form—with the box still checked—two months after originally submitting it, which tends to show that Kennedy did not intend for or believe the questionnaire to be a charge when she submitted it in December 2001. JA 265; Resp. Br. 5. The Government also finds "intent" in Kennedy's checking of the box indicating consent to disclosure of her identity to her employer. U.S. *Amicus* Br. 23; JA 265. It is fair to conclude, however, that most would find a lack of "intent" from the lengthy expression of concern about confidentiality in the attached affidavit: "I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential . . . ." JA 266; *see also* U.S. *Amicus* Br. 4. In fact, a finding of no intent is consistent with the EEOC's Compliance Manual, which indicates that a document "express[ing] concerns about confidentiality" is not a charge. *See* 1 EEOC Compl. Man. § 2.2(b).

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charge only if they are reduced to writing. 29 C.F.R. § 1626.8. Whether such allegations are reduced to writing, however, and, if so, whether that writing accurately reflects the caller's intent, are within the EEOC's, not the employee's, control.

Because the "beholder" in these circumstances is the EEOC, not the employee, the Government's proposed "intent" test would also hold employees responsible for conduct outside their control.

c. Inconsistency

While the Government presents its test as a means of avoiding inconsistent treatment of similar documents, *see* U.S. *Amicus* Br. 13, in reality it virtually guarantees such inconsistent treatment. In this very case, the same document has been viewed differently by different parties allegedly applying an "intent" test. Kennedy submitted a Form 283 "Intake Questionnaire." Unlike a Form 5 "Charge of Discrimination," the intake questionnaire used by Kennedy does not contain an implied request that the EEOC initiate an ADEA action by giving notice and attempting conciliation. *See* Pet. Br. 4. Instead, it implies a request only for "pre-charge filing counseling" and determination of jurisdiction. *See id.*[7]

It is unsurprising, then, that field agents twice did not treat Kennedy's intake questionnaire as a charge, a determination with which the District Court agreed.

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[7] According to the Government, it has changed its questionnaire form to indicate that it is used for "charge filing counseling," rather than for "pre-charge filing counseling," and that it will be deemed a charge if it is the only timely document available. *See* U.S. *Amicus* Br. at 3 n.2. Even this new language, however, implies a request only for counseling, not to proceed with an ADEA action by proceeding with a charge. And while the new form does state that it will be a "charge" in certain circumstances, it fails to advise employees that the EEOC must give prompt notice of the questionnaire to their employers.

Yet the Second Circuit below and the Government before this Court purport to apply the "intent" test to the same document and see things differently. Meanwhile, the Eleventh Circuit Court of Appeals applied an "intent" test to an intake questionnaire virtually identical to Kennedy's and found that it was not a charge. *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1240–41 (11th Cir. 2004). The Court should not enshrine a test that yields results, like these, that are "all over the map."

d. *Manipulability*

Finally, regardless of how it is posed, the Government's intent test is plainly subject to manipulation because it allows the "intent" underpinning a document to be determined well after the document's submission, rather than "promptly." *See also supra* Part II.B.1. For instance, in this case, the EEOC did not treat Kennedy's intake questionnaire as a charge when it was first submitted in December 2001, nor when it was resubmitted in February 2002. Five years later—and after the Court had decided to review the matter—the EEOC changed its mind, indicating in a memorandum that it had twice handled Kennedy's intake questionnaire incorrectly and that the questionnaire had been a charge all along. The potential for *post hoc* application of the Government's proposed test prevents an EEOC decision from ever being final because the EEOC can change its determination about whether a document constitutes a charge at any stage.[8] This unfettered discretion is

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[8] Furthermore, courts will review the EEOC's determination and decide for themselves "from a plain reading (Cont'd)

certainly an advantage to the EEOC—and a likely reason for the Government's advocacy of an "intent" test. The shifting nature of a document's status, however, benefits neither the employee nor the employer and certainly does not fulfill Congress' intent to require prompt notice and conciliation.

For good reasons, exemplified by the specific document in this case, neither Petitioner, nor Respondents, nor any of the other *amici* support a rule that involves intent.[9] Only the Government advocates the test, which runs contrary to the language and purpose of the ADEA.[10] If the Government can accept a

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of the document" what an employee intended. Different courts will decide the question differently, due to the inherently vague nature of the exercise.

[9] Although Petitioner did not object to the use of the so-called "manifest intent test" below or in *Bost v. Federal Express Corp.*, 372 F.3d 1233 (11th Cir. 2004), it cannot now support a test that is unfaithful to the text and purpose of the ADEA, particularly after experiencing first-hand the vagaries of its application and increasingly evident inconsistencies.

[10] It is ironic that the Government proposes this unworkable test, when the EEOC could easily promulgate a set of forms clearly indicating what is, and what is not, a "charge" within the meaning of the ADEA. For example, the EEOC could use one preliminary form indicating that it *will not* result in notice and efforts at conciliation and, accordingly, *will not* satisfy the charge-filing requirements of § 626(d), and a second form indicating that it *will* result in notice to the employee's employer and the initiation of informal resolution, such that it *will* satisfy the charge-filing requirements of § 626(d). Rather than taking
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"functional definition" using an employee's intent, it should not object to the functional definition included in the statute, which requires notice and an opportunity for informal resolution. The Court should reject the Government's proposed "intent" test.

C. Respondents' rudimentary definition of a charge ignores the text, structure, and purpose of the ADEA.

The Court should also reject Respondents' proposed rule, which would grant the status of "charge" to any document satisfying the minimal requirements specified in 29 C.F.R. §§ 1626.6 and 1626.8(b). Resp. Br. 18–19. This rule is both unworkable and unfaithful to the statute.

First, like the Government's proposed "intent" rule, Respondent's proposed "form and content" rule would illegitimately permit courts to determine that the charging requirements of § 626(d) have been met even where the employer has received no notice and no attempts at informal resolution have been made. Second, Respondents' rule reads two regulations specifying the *form* and *contents* of a charge as though those regulations were intended to exhaust what a charge *is*. Resp. Br. 18. This reading is inconsistent with the text

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such simple steps to clarify the issue, however, the EEOC has actually made it more confusing. *See supra* Section II.B.1; *supra* note 7; *cf. Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 544 (7th Cir. 1988) ("We hope that in the future the EEOC will give better assistance to employees that will avoid needless disputes over what should be simple, uncomplicated procedures.").

of the regulations themselves. Only 29 C.F.R. § 1626.3 purports to state what the term "charge" "means," but its requirements are so minimal that neither Respondents nor the Government argue that it exhausts what a charge "is."[11] The other regulations address only the "form," and "contents" of a charge, without purporting to state what a charge "is." *See* 29 C.F.R. §§ 1626.6, 1626.8. In addition, Respondent's reading is inconsistent with the position of the promulgating agency that something more—admittedly, a "something more" with which Petitioner profoundly disagrees—is required for a charge.[12]

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[11] Indeed, Section 1626.3 defines "charge" and "complaint" in the same way, except that a "complaint" is whatever is not a charge. *See* 29 C.F.R. § 1626.3. Thus, Section 1626.3 can never, by itself, identify a "charge." *See* 29 C.F.R. § 1626.3; U.S. *Amicus* Br. 14–15 n.5; *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79–80 (7th Cir. 1992) (understanding the regulations to say that an intake questionnaire is, quite simply, a "complaint," distinguishable from a charge by its failure to result in notice to the employer).

[12] Petitioner and the Government agree that "something more" is required but disagree as to what that "something more" must be. If the Court were ever to craft a rule under which the "something more" could be anything other than the notice and opportunity for conciliation required by Congress, as argued by Petitioner, it should craft a rule requiring *objective* evidence that the document should have been treated as a charge at the time it was submitted, rather than the shockingly unreliable indicia of "intent" proposed by the Government. The best such evidence would be use of the Form 5 "Charge of Discrimination." Concrete evidence of contemporaneous communications from the EEOC that the document would function as a charge through notice and conciliation or that the employee expressly requested that it so function might also be considered in rare circumstances. No such evidence is presented by the record in this case.

Third, Respondents' "form and contents" rule gives no credence to the legitimate concern about "intake counseling" underlying the flawed "intent" rule proposed by the Government. The Government is so concerned about maintaining an intake counseling process that it has articulated an extra-regulatory "intent" rule to ensure that not every document with the form and contents specified in 29 C.F.R. §§ 1626.6 and 1626.8 is treated as a charge. *See* U.S. *Amicus* Br. 18 (articulating important reasons not to treat every such submission as a charge). Respondents' "content" rule leaves no room for such intake counseling. Indeed, Respondents' rule would go much further in manufacturing "charges" than even the opinion of the Second Circuit, which, like the Government's proposed rule and that of the great majority of courts, *see* Pet. 15–18, requires more than mere form and contents, *see id.* at 15a.

For all these reasons, the Court should decline Respondents' invitation to foist the status of "charge" on every document meeting the minimal requirements of 29 C.F.R. §§ 1626.6 and 1626.8.

III. REQUIRING NOTICE AND CONCILIATION BEFORE SUIT DOES NOT UNFAIRLY INFRINGE ON EMPLOYEES' RIGHTS.

The Court should give no credence to the alarmist defense raised by Respondents and their *amici*, who claim that employees will lose their rights to have their claims heard on the merits if the statute's requirement that notice and conciliation occur before suit is brought is strictly enforced. These arguments are not applicable under the facts in the instant case. Moreover, it is not

necessary for this Court to disregard Congress' intent in order to remedy any unfairness because equitable doctrines already exist to address the rare case where an employee's right to sue is unfairly foreclosed by the EEOC's failure to treat a particular document as a charge.

A. Kennedy's claim would not have been "eliminated" by requiring all of the requirements of § 626(d) to be met before she could bring suit.

Respondents and their *amici* are incorrect in asserting that Kennedy's right to file suit would have been "eliminated" had the notice and conciliation requirements of § 626(d) been enforced in this case.

Kennedy filed a Form 5 "Charge of Discrimination" with the EEOC that resulted in notice to FedEx. JA 275. Her counsel, however, filed this lawsuit before Kennedy filed her charge, which dictated dismissal of the lawsuit under the statute. 29 U.S.C. § 626(d) ("*No civil action may be commenced* by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission.") (emphasis added).

Had Kennedy's counsel simply dismissed the premature lawsuit, he could have re-filed suit on the basis of Kennedy's Form 5 "Charge of Discrimination" after the expiration of the sixty-day notice and conciliation period (assuming the informal methods of resolution were unsuccessful). Kennedy's counsel never

filed suit based on Kennedy's Form 5 "Charge of Discrimination."

Accordingly, Kennedy's claim was not and would not have been "eliminated" by enforcement of the notice and conciliation provisions of the ADEA. Rather, her claim is now barred only because of her counsel's decision not to file suit based on her charge.

B. Existing equitable remedies are sufficient to address the rare exception when an employee's rights may be unfairly forfeited by the EEOC's inaction.

Although it may be possible for exceptional circumstances—not present in this case—to arise in which an employee's claim might be barred by the EEOC's failure to give notice of a particular document, it is unnecessary for this Court to ignore the statutory requirements for a "charge" to deal with such rare circumstances. Congress made clear in its 1978 amendments to the ADEA that equitable doctrines apply to the charge-filing requirements of § 626(d), and equitable doctrines, in particular equitable tolling, already exist to address any unfairness that might result from strict enforcement of § 626(d)'s notice and conciliation requirements.

Generally, no unfairness would result if the EEOC failed to give notice and conciliation of a document that fully met its requirements for the form and contents of a charge because the employee could simply submit another document, which the EEOC could then treat as a charge by providing prompt notice to the employer

and an opportunity for conciliation. In those occasional circumstances where such a subsequent document would be untimely because the 180- or 300-day limit for filing a charge has passed, however, the availability of equitable tolling in appropriate circumstances gives the employee ample opportunity to "redress [her] grievance[]" by equitably extending the time in which she may file another charging document. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).[13] Accordingly, Respondents and the Government err in asserting that enforcement of the ADEA's notice requirement raises a due process concern. *See* Resp. Br. 34; U.S. *Amicus* Br. 26–27.[14]

Because equitable doctrines are exactly that—equitable—they provide the necessary means for balancing between fairness to the employee and fairness to the employer. As this Court has previously said in the context of Title VII, the application of equitable doctrines in appropriate circumstances "honor[s] the remedial

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[13] Equitable tolling was unnecessary in the present case, however, because Kennedy's May 2002 Form 5 "Charge of Discrimination," which resulted in notice to FedEx, was filed within 300 days of the alleged discrimination and was, therefore, timely for purposes of the ADEA.

[14] Moreover, an employee who has not filed a Form 5 "Charge of Discrimination" has not done everything in her "power" to bring suit as required by statute and the EEOC. *See Logan*, 455 U.S. at 444 (Powell, J., concurring). Thus, even if that employee's claim were barred, she has been deprived of no property interest. *See id.* at 437 (majority opinion) ("The State may erect reasonable procedural requirements for triggering the right to an adjudication.").

purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982). In light of the existing equitable doctrines in place to address any potential unfairness in the ADEA, this Court should reject the invitation of Respondents and their *amici* to "negat[e] the particular purpose of the filing requirement," *Zipes*, 455 U.S. at 398, by ignoring the notice and conciliation requirements of § 626(d).

CONCLUSION

For the foregoing reasons, the Second Circuit's decision should be reversed with instructions to affirm the district court's decision dismissing the claims of Kennedy and those Respondents attempting to piggyback on Kennedy's intake questionnaire.

Respectfully submitted,

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In the Supreme Court of the United States

FEDERAL EXPRESS CORPORATION, PETITIONER

v.

PAUL HOLOWECKI, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Age Discrimination in Employment Act of 1967 (ADEA), provides that "[n]o civil action may be commenced by an individual * * * until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." 29 U.S.C. 626(d). The question presented is what constitutes "a charge alleging unlawful discrimination" under the ADEA.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The question presented in this case is what constitutes "a charge alleging unlawful discrimination" under the Age Discrimination in Employment Act of 1967 (ADEA or Act), 29 U.S.C. 621 *et seq.* The Equal Employment Opportunity Commission (EEOC or Commission) administers and enforces the ADEA, and has promulgated regulations prescribing the form and content of charges under the Act. In addition, the resolution of the question presented will inform the requirements for a charge alleging discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 *et seq.* The EEOC has promulgated similar regulations under those statutes prescribing the form and content of charges filed with the Commission, and it has also entered

into agreements with various federal and state agencies stating that complaints filed with those agencies may constitute charges when they involve matters within the Commission's jurisdiction. In addition, the Attorney General has enforcement responsibilities under Title VII and the ADA with respect to state and local employers. The EEOC has a direct interest in the validity of its "charge" regulations, and the Court's resolution of this case will impact the enforcement responsibilities of both the EEOC and the Attorney General.

STATEMENT

1. The ADEA makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). As to private employers, that prohibition may be enforced in public actions brought by the Commission, 29 U.S.C. 626(b), and through private suits, 29 U.S.C. 626(c).[1] Enforcement under the ADEA is generally triggered by the filing of "a charge alleging unlawful discrimination" with the Commission within 180 or 300 days of the alleged unlawful practice, depending on the jurisdiction. 29 U.S.C. 626(d). Acting pursuant to an express grant of authority, see 29 U.S.C. 628, the EEOC has adopted regulations that define the term "charge," 29 C.F.R. 1626.3; establish three minimum requirements regarding a charge's form, 29 C.F.R. 1626.6; and identify other information that charges "should contain," 29 C.F.R. 1626.8.

The ADEA provides that, "[u]pon receiving such a charge [of discrimination], the Commission shall promptly notify all persons named in the charge as prospective defendants * * *

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[1] A separate provision of the ADEA addresses age discrimination by federal employers. See 29 U.S.C. 633a (Supp. IV 2004). The procedures set forth in Section 633a differ in important respects from those applicable to private employers and are not at issue here.

and shall promptly seek to eliminate any alleged unlawful employment practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. 626(d). Such attempts at conciliation are a statutory prerequisite to an action by the Commission. 29 U.S.C. 626(b). In contrast, private plaintiffs may initiate suit at any point starting 60 days after filing a timely charge, 29 U.S.C. 626(d), and ending 90 days after receiving notice that the Commission has terminated its own proceedings, 29 U.S.C. 626(e). Unlike Title VII (see 42 U.S.C. 2000e-5(f)(1)), there is no requirement that an ADEA plaintiff receive a right-to-sue letter or other EEOC document before filing suit.

2. Respondent Patricia Kennedy (respondent) is a courier for petitioner, Federal Express Corporation. J.A. 265. On December 3, 2001, respondent contacted the EEOC's Tampa field office and completed an EEOC "Intake Questionnaire" form. *Ibid.*; C.A. App. 108a.[2] Respondent's form contains name, address, and telephone information for petitioner and respondent. J.A. 265. It states that respondent has been subjected to "age discrimination" that has affected "virtually every facet of [respondent's] job, [i]ncluding but not limited to starting time; courier performance reviews; late packages

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[2] The Intake Questionnaire form that respondent submitted is an outdated 1987 version of the standard Form 283 contained in the EEOC Compliance Manual. See 1 EEOC Compl. Man. (BNA) Exh. 1-B at 1:0005-1:0006 (June 2001) (*EEOC Manual*). Among other differences, standard Form 283: (1) is captioned "Charge Questionnaire"; (2) states that it will be deemed "a sufficient charge of discrimination" where it "constitutes the only timely written statement of allegations of employment discrimination"; and (3) describes its "Routine Uses" as determining whether the Commission has jurisdiction over "allegations of employment discrimination and * * * provid[ing] such charge filing counseling as is appropriate." In the past, many of the EEOC's field offices modified Form 283 in various respects. On December 4, 2006, however, the EEOC adopted a Uniform Intake Questionnaire for use by its National Contact Center, and, on August 30, 2007, mandated its use by all field offices.

and data scans; on-the-job injuries; and other employee benefits." *Ibid.* According to the form, the discrimination has spanned "the past several years," with the most recent harm having occurred on December 3, 2001, the date on which the form was initially completed. *Ibid.* The form also expresses respondent's consent to have her identity disclosed to petitioner. *Ibid.*

Respondent attached a five-page notarized affidavit to the form detailing her allegations. J.A. 266-274. The affidavit contains a caption with spaces for a "Case Name" and a "Case No." J.A. 266. The affidavit begins by stating that respondent has been "given assurances by an Agent of [the EEOC] that this Affidavit will be considered confidential * * * and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding." *Ibid.* The affidavit contains detailed allegations about how petitioner has used its "Best Practices Pays" program to "systematically target[]" respondent and other older workers, thus making it more difficult for them to meet petitioner's "*minimum acceptable performance standards* or *MAPS*." J.A. 267; see J.A. 267-272.

The affidavit closes by stating:

> Please force [petitioner] to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created with their application of *Best Practices/ High-Velocity Culture Change.*

J.A. 273.

The EEOC's Tampa field office did not serve notice of respondent's December 3, 2001, submission on petitioner or begin an investigation, as the Commission is required to do under Section 626(d) when it receives a charge. Pet. App. 5a. On April 30, 2002, respondent and thirteen other individuals, who are also respondents here, filed a representative action

alleging that petitioner had violated the ADEA and various state laws proscribing age discrimination. J.A. 19-35.[3]

3. The district court granted petitioner's motion to dismiss the complaint. Pet. App. 31a-42a. The court concluded that respondent's December 3, 2001, submission did not constitute a "charge" under the ADEA because the Act does not "specifically state[]" that "an intake questionnaire or affidavit constitute[s] sufficient notice to the EEOC of alleged discrimination." *Id.* at 39a. Although the district court acknowledged that other courts had "on occasion * * * found that an intake questionnaire constitutes a formal charge," it stated that those rulings "involved situations where the plaintiff has been led by the EEOC to believe that the questionnaire alone constituted sufficient notice." *Ibid.*

4. The court of appeals reversed. Pet. App. 3a-23a. The court held that "a writing submitted to the EEOC" is a "charge" within the meaning of the ADEA when it contains the information required by EEOC regulations and a "reasonable person" would conclude "that the grievant has manifested an intent to activate the Act's machinery." *Id.* at 15a (quoting *Bihler* v. *Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983)). While recognizing the importance of the EEOC's statutory notice and conciliation duties, the court refused to adopt an interpretation that "would * * * hold individuals accountable for the failings of the agency." *Id.* at 16a. The court then held that respondent's December 3, 2001, submission consti-

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[3] After filing suit, respondent submitted to EEOC a form captioned "Charge of Discrimination," which is also known as a "Form 5 charge." J.A. 275-276; see 1 *EEOC Manual* Exh. 2-C at 2:0009-2:0010 (Aug. 2002). This two-page form, which was signed on May 30, 2002, contains the same basic information as respondent's December 3, 2001, submission, including contact information, an estimate of petitioner's number of employees, an assertion of unlawful age discrimination, and a brief factual narrative. J.A. 275. The Commission assigned a charge number to this submission. *Ibid.*

tutes a "charge" under that test, because it satisfied the EEOC's regulations and "communicated [respondent's] intent to activate the EEOC's administrative process." *Id.* at 18a. In reaching the latter conclusion, the court pointed, *inter alia*, to the affidavit's "forceful tone and content," respondent's consent to have her identity disclosed to petitioner, and respondent's request for EEOC to "force [petitioner] to end their age discrimination plan." *Id.* at 19a (quoting J.A. 273).[4]

SUMMARY OF ARGUMENT

The court of appeals correctly held that respondent's intake questionnaire and affidavit constitute "a charge alleging unlawful discrimination" under the ADEA.

A. In answering the question presented, the Court should follow the framework set forth in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). The first inquiry under *Chevron* is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. The answer to that question is no, because the ADEA does not define or otherwise provide concrete guidance as to the meaning of "charge." Petitioner argues that Congress has directly spoken to the issue by defining "charge" based on whether the EEOC fulfills its notice and conciliation obligations with respect to a submission. That argument is directly contradicted by the statute's text.

The pertinent provision of the ADEA states that, "[u]pon receiving such a charge," the EEOC shall promptly notify the employer and seek to eliminate any unlawful discrimination through conciliation. 29 U.S.C. 626(d). But the Act makes clear that the notice and conciliation obligations do not define

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[4] Having concluded that respondent's December 3, 2001, submission was a charge, the court of appeals held that eleven other plaintiffs who had not submitted anything to EEOC could "piggyback" on that filing. Pet. App. 21a. That holding is not before this Court. See Pet. i.

what a charge *is*, because those obligations do not attach until the EEOC has received "such a charge." *Ibid.* In addition, the notice and conciliation requirements serve different objectives than the charge-filing requirement. A contrary construction would conflict with the Court's analysis of an analogous statutory question in *Edelman* v. *Lynchburg College*, 535 U.S. 106 (2002), unfairly penalize private parties for agency mistakes, and mean that the same submission could be treated differently based solely on agency conduct outside the complainant's control.

B. Because Congress has not directly spoken to the question of what is a "charge," resolution of this case turns on whether the agency has adopted "a permissible construction of the statute." *Chevron*, 467 U.S. at 843. It has. Acting pursuant to an express grant of authority, the EEOC has reasonably, and thus permissibly, defined "charge" as a submission that meets the form and content requirements set forth in the EEOC's regulations and objectively manifests a submitter's intent to make a formal accusation that a named party has engaged in unlawful discrimination. That interpretation is consistent with the dictionary meaning of "charge," *i.e.*, an accusation or indictment; gives effect to the EEOC's regulations, the EEOC Compliance Manual, and formal administrative guidances; and avoids the arbitrary and unfair results of tying the definition of charge to conduct outside a complainant's control.

In practice, most of the charges meeting the EEOC's definition are made on the EEOC's Form 5, which is entitled "Charge of Discrimination." But as both the EEOC Compliance Manual and binding guidances issued in 2002 and 2007 expressly state, "correspondence," including intake questionnaires, may also qualify as charges. That conclusion is consistent with Congress's use of the general term "charge" and the remedial object of the statute. Although the EEOC's

past practice at the field office level has not been uniform in treating such submissions as charges, the EEOC has recently taken steps to ensure that all submissions constituting charges—including intake questionnaires or other correspondence—are treated as charges, as required by the ADEA.

C. The EEOC's administrative interpretation of "charge" is entitled to deference. The agency's interpretation is consistent with the text and object of the ADEA and gives "specificity to a statutory scheme that the [Commission is] charged with enforcing and reflect[s] the considerable experience and expertise that the [EEOC] ha[s] acquired over time with respect to the complexities of" dealing with the wide variety of submissions it receives from members of the public. *Gonzales* v. *Oregon*, 546 U.S. 243, 256 (2006). Although the objective intent requirement is not expressly stated in EEOC regulations, it is embodied in the EEOC Compliance Manual and two formal advisory memoranda, and reflects a permissible construction of the EEOC's regulations. See *Auer* v. *Robbins*, 519 U.S. 452 (1997). In addition, the EEOC has reasonably determined that its construction appropriately accounts for the fact that most submissions are made by laypersons who are unlikely to appreciate the legal requirements for initiating a case. The admittedly uneven past practice in processing submissions at the field office level does not deprive the EEOC's interpretation of the deference that is customarily accorded such agency interpretations.

D. Respondent's December 3, 2001, submission constitutes "a charge alleging unlawful discrimination" under the ADEA. There is no dispute that respondent's submission complies with all of the regulatory requirements as to a charge's form and content. In addition, respondent's intake questionnaire and accompanying affidavit objectively manifest an intent to make a formal accusation of unlawful age discrimination against petitioner. In particular, on the intake

questionnaire respondent specifically gives consent for the EEOC to disclose her identity to petitioner, and that document was accompanied by a five-page notarized affidavit that details the alleged discrimination and asks the EEOC to "force [petitioner] to end [such] discrimination." J.A. 266-274. That submission clearly and objectively manifests an intent to make a formal accusation of unlawful age discrimination.

E. The fact that the EEOC failed to fulfill its notice and conciliation duties upon receiving respondent's charge does not transform that charge into something else, and it does not bar respondent's suit. As discussed, the ADEA's text establishes no such rule, and the background rule is that a private party's right to sue is generally not dependent on the government's faithful performance of its own duties. See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). At the same time, if the EEOC has failed to comply with its statutory duties, a district court may take steps to minimize any prejudice to the defendant. For example, a court may stay proceedings—including discovery—for a period to provide an opportunity for conciliation, dismiss the suit based on the doctrine of laches if the plaintiff has delayed unreasonably in filing it, or take the defendant's lack of timely notice into account when crafting evidentiary and other trial-management rulings. But when the agency regrettably drops the ball in handling a timely submitted charge, defendants are not entitled to a windfall in the form of the dismissal of a potentially meritorious age discrimination suit.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT'S INTAKE QUESTIONNAIRE AND ACCOMPANYING AFFIDAVIT CONSTITUTE "A CHARGE ALLEGING UNLAWFUL DISCRIMINATION" UNDER THE ADEA

The question presented is what constitutes "a charge alleging unlawful discrimination" under the ADEA. 29 U.S.C. 626(d). In answering that question, this Court should follow the framework established by *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Under that familiar framework, the Court first considers "whether Congress has directly spoken to the precise question." *Id.* at 842. If the answer to that question is no, then the Court considers "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. As explained below, in this case, a proper application of the *Chevron* framework leads to the conclusion that the EEOC's interpretation should be given effect: a "charge" is a submission that meets the form and content requirements set forth in the Commission's regulations and objectively manifests a submitter's intent to make a formal accusation that a named party has engaged in unlawful discrimination. Applying that interpretation, respondent's intake questionnaire and accompanying affidavit constitute a charge within the meaning of the ADEA.

A. Congress Has Not Directly Spoken To What Is A "Charge" Under The ADEA

The ADEA does not directly answer the question presented because it does not define the term "charge." Although petitioner explicitly acknowledged in its petition (at 8) that "the ADEA does not define what constitutes a charge," it now asserts that the Act "straightforwardly defines 'charge'" as a document that "activate[s] the EEOC's

investigative machinery." Pet. Br. 11-12. That argument is directly contradicted by the ADEA's text. After referring in general terms to a "charge alleging unlawful discrimination," the Act states that, "[u]pon receiving such a charge," the EEOC shall promptly notify the employer and seek to eliminate any unlawful discrimination through conciliation. 29 U.S.C. 626(d). But a plain reading of Section 626(d) makes clear that the notice and conciliation obligations do not define what a charge *is* in the first place, because those obligations do not attach until the EEOC has received "such a charge." *Ibid.* Treating the notice and conciliation obligations as elements of what is a charge triggering those obligations would require an implausible "structural and logical leap." *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 112 (2002).

That conclusion follows lock step from the result that this Court reached in *Edelman* in rejecting an analogous statutory argument as to the meaning of "charge" under Title VII. Like the ADEA, Title VII requires that prospective plaintiffs file a "charge" within a specified period, 42 U.S.C. 2000e-5(e)(1), but, unlike the ADEA, it also declares that "[c]harges shall be in writing under oath or affirmation," 42 U.S.C. 2000e-5(b). *Edelman* concerned the validity of an EEOC regulation permitting "an otherwise timely filer to verify a charge after the time for filing had expired." 535 U.S. at 109.

The Court began by rejecting the court of appeals' conclusion that the EEOC regulation was invalid because Title VII itself defined "charge" as a document made under oath or affirmation. *Edelman*, 535 U.S. at 112-113. The Court stressed that neither the timing nor the oath provision defined "charge," and that the term was "likewise undefined elsewhere in the statute." *Id.* at 112. Nor did either provision "incorporate[] the other so as to give a definition by necessary implication." *Ibid.* The Court further determined that "the two quite different objectives of the timing and verification

requirements"—which it identified as "encourag[ing] a potential party to raise a discrimination claim before it gets stale" and "protecting employers from the disruption and expense of responding to such a claim unless a complainant is serious enough and sure enough to support it by oath subject to liability for perjury," respectively—"st[oo]d in the way of reading 'charge' to subsume them both by definition." *Id.* at 112-113.

The *Edelman* analysis precludes a finding that the ADEA defines "charge" as a document that is served on an employer and results in an attempt at conciliation. The ADEA's notice and conciliation command does not purport to say what a charge *is*, and the term "charge" is likewise undefined in the Act's separate definitions section (29 U.S.C. 630). The Act's use of the phrase "*such a* charge" in both the timing and notification provisions further confirms that the notice and conciliation requirements do not inform the *meaning* of the term "charge," but instead are obligations *triggered* by the receipt of a charge. And unlike the verification provision in *Edelman*, the ADEA's notice and conciliation command does not even involve the contents of the required filing, and it is directed to the entity that receives the filing (the EEOC) rather than the person who is required to make it.

In addition, as in *Edelman*, the requirements set forth in Section 626(d)'s three sentences serve distinct, albeit complementary, purposes. A complainant's filing of "a charge alleging unlawful discrimination" alerts the EEOC to the existence of potentially unlawful conduct and provides the Commission with enough information to begin investigating. The requirement that "[s]uch a charge" be filed within a specified period ensures that a prospective plaintiff has not slept on her rights and weeds out stale claims. And the Commission's mandatory duties to alert the employer and attempt conciliation whenever it receives "such a charge" are designed to provide prompt notice to prospective defendants and to facilitate in-

formal resolutions of disputes that do not involve the courts, when possible.

The untenable consequences of petitioner's construction further confirm that the ADEA does not define "charge" based on what the EEOC is required to do after receiving one. Under that construction, the same document may, or may not, be a "charge" based solely on factors outside a complainant's control. In addition, although petitioner purports to remain agnostic (Pet. Br. 28 n.12), an inescapable implication of its argument is that no filing—including an EEOC Form 5—may constitute a "charge" sufficient to preserve a private plaintiff's right to sue whenever the EEOC fails, for whatever reason, to comply with its statutory obligations to serve notice and attempt conciliation. See pp. 25-27, *infra*.

B. The EEOC Has Reasonably, And Thus Permissibly, Defined "Charge" Within The Meaning Of The ADEA

Because Congress has not directly spoken to the issue, the EEOC has issued regulations—and binding interpretations of those regulations—that together define "charge" as a submission that contains the elements required by the EEOC's regulations and is received under circumstances that objectively indicate an intent to make a formal accusation of unlawful conduct against an identified person or entity. Because that definition is a reasonable construction of both the ADEA and the EEOC's own regulations, it is entitled to "substantial deference." *Gonzales* v. *Oregon*, 546 U.S. 243, 255 (2006).

The ADEA authorizes the EEOC to "issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter." 29 U.S.C. 628. In 1983, after engaging in formal notice-and-comment rulemaking, the Commission issued regulations regarding the form and content of ADEA charges. See 46 Fed. Reg. 9970 (1981) (notice of proposed rulemaking); 48 Fed. Reg. 138 (1983) (final rule); 26

C.F.R. 1626. Because Congress explicitly "left a gap for the agency to fill" as to the meaning of "charge," and because "there is an express delegation of authority" to issue regulations of this kind, the EEOC's regulations are entitled to *Chevron* deference. *Chevron*, 467 U.S. at 843-844; see *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001); *Edelman*, 535 U.S. at 120, 122 (O'Connor, J., joined by Scalia, J., concurring in the judgment).

The EEOC's regulations do three things that are pertinent here. First, they define "charge" as "a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act." 29 C.F.R. 1626.3. Second, they establish three minimum requirements: "A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s)." 29 C.F.R. 1626.6. Third, they set forth information that charges "should contain," including contact information for all persons against whom the charge is being made; a "clear and concise" description of the allegedly discriminatory acts, including relevant dates; the approximate number of people employed by the proposed respondent; and whether proceedings have been commenced before an appropriate State agency. 29 C.F.R. 1626.8(a). That same provision, however, declares that "a charge is sufficient when the Commission receives * * * either a written statement or information reduced to writing by the Commission that conforms to the requirements of § 1626.6." 29 C.F.R. 1626.8(b).[5]

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[5] Because the EEOC need not receive a charge to initiate public enforcement under the ADEA, see *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), the regulations also define a "complaint" as "information received from any source, that is not a charge, which alleges that a named prospective defendant has engaged in or is about to engage in actions in violation of the Act." 29 C.F.R. 1626.3. Contrary to the Chamber of Commerce's suggestion

At the same time, although the regulations do not expressly so provide, the EEOC has reasonably concluded that not every communication possessing the three characteristics set forth in 29 C.F.R. 1626.6 is a "charge alleging unlawful discrimination" under Section 626(d). Rather, the EEOC's considered view is that to constitute a charge, a written submission must objectively manifest an intent to make a formal accusation that an identified person or entity "has engaged or is about to engage in action in violation of the Act." 29 C.F.R. 1626.3. That objective intent requirement squares with the common dictionary definition of the term "charge"—*i.e.*, "[A]n accusation or indictment," *The American Heritage Dictionary of the English Language* 226 (1976)[6]—and is embodied in the EEOC Compliance Manual and two formal advisory memoranda. See pp. 16-18, *infra*.

A completed Form 5 "Charge of Discrimination" is the prototypical example of a "charge" that is received and processed by the EEOC. But the EEOC has never formally taken the position that *only* a completed Form 5 may constitute a "charge." That Form is neither contained nor referenced in any of the EEOC's regulations. Form 5 is included as an exhibit in the EEOC Compliance Manual, a publication that sets forth suggested guidance for field offices. See 1

(at 12), neither the Commission's regulations, nor any other EEOC document states that "[t]he completed Intake Questionnaire is the complaint [and a Form 5] is the charge," *Early* v. *Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992), and *Early* itself acknowledged that intake questionnaires may sometimes constitute charges, see *id.* at 80-81.

[6] See also *Funk & Wagnalls New Standard Dictionary of the English Language* 451 (1945) ("An accusation, allegation, or imputation, or the subject-matter thereof"); *The Random House Dictionary of the English Language* 248 (1966) ("an accusation"; synonyms: "indictment, imputation, allegation"); 2 *The Oxford English Dictionary* 284 (1978) ("Attribution or imputation of something culpable; accusation").

EEOC Manual Exh. 2-C at 2:0009-2:0010 (Aug. 2002). But the Form's inclusion in the EEOC Compliance Manual merely indicates that a Form 5 is typically *sufficient* to constitute a charge, not that it is the only thing that may constitute one. Cf. Fed. R. Civ. P. 84 (emphasizing that "[t]he forms contained in the Appendix of forms are *sufficient* under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate") (emphasis added).

Indeed, far from suggesting that a Form 5 is the only document that may constitute a charge, Section 2.2(b) of the EEOC Compliance Manual specifically instructs that "correspondence"—which another Section defines as "[a]ll written requests for assistance unrelated to a pending charge/complaint, whether prepared on an EEOC form or not"—should be treated as a charge whenever it "contains all information necessary to begin investigating, constitutes a clear and timely request for EEOC to act, and does not express concerns about confidentiality or retaliation." 1 *EEOC Manual* § 2.2(b) at 2:0001 (Aug. 2002); see *id.* § 1.6, at 1:0001 (June 2001) (definition of "correspondence"). In addition, the case law confirms that the EEOC has in practice treated some non-Form 5 documents as charges,[7] and the EEOC has for decades taken the position in litigation that intake questionnaires and accompanying documents may sometimes constitute charges.[8]

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[7] See, *e.g.*, *Wilkerson* v. *Grinnell Corp.*, 270 F.3d 1314, 1316 (11th Cir. 2001); *Philbin* v. *General Elec. Capital Auto Lease, Inc.*, 929 F.2d 321, 322 (7th Cir. 1991) (per curiam); *Price* v. *Southwestern Bell Tel. Co.*, 687 F.2d 74, 76 (5th Cir. 1982).

[8] See, *e.g.*, Gov't Amicus Br. at 10-15, *Casavantes* v. *California State Univ.*, 732 F.2d 1441 (9th Cir. 1984) (No. 83-2087); Gov't Amicus Br. at 5-6, 12-13, *Philbin*, *supra* (No. 90-2945); Gov't Br. at 12-15, *Shempert* v. *Harwick Chem. Corp.*, 151 F.3d 793 (8th Cir. 1998) (No. 97-1634), cert. denied, 525 U.S. 1139 (1999); Gov't Amicus Br. at 15-19, *Scruggs* v. *University Health Serv.*, 281 F.3d

Furthermore, top EEOC officials have twice in recent years reiterated, in binding guidances issued to all field offices, that there are circumstances in which intake questionnaires and other correspondence may constitute charges. On February 21, 2002, the EEOC's Director of the Office of Field Programs (Director) issued a Memorandum mandating use of the EEOC Compliance Manual standard for determining whether a non-Form 5 submission constitutes a charge: "When correspondence contains all the information necessary to begin investigating, constitutes a clear and timely request for EEOC to act, and does not express concerns about confidentiality or retaliation, we should docket it as a charge; acknowledge it [with the complainant]; and serve a copy on the respondent." App., *infra*, 5a. On August 13, 2007, the Director and the EEOC's General Counsel issued a joint Memorandum reiterating that "[a]n intake questionnaire or other correspondence can constitute a charge under the statutes we enforce if it contains all the information required by EEOC regulations governing the contents of a charge and constitutes a clear request for the agency to act." *Id.* at 7a. Those formal agency memoranda are binding on all of the EEOC's field offices and represent the Commission's considered position

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1285 (11th Cir. 2001) (Table) (No. 01-10935). Although the EEOC has consistently taken the position in litigation that documents other than Form 5s may constitute charges, it has at times argued that a particular document constituted a charge solely because it met the form and content requirements set forth in EEOC regulations. See, *e.g.*, Gov't Amicus Br. at 17, *Gordon* v. *Shafer Contracting Co.*, 469 F.3d 1181 (8th Cir. 2006) (No. 06-1963) (arguing that because an intake questionnaire satisfied "all of the statutory and regulatory requirements, * * * no more [was] needed to" deem that document a charge). Those briefs are inconsistent with the EEOC's considered view that a submission must not only meet the form and content requirements but also manifest the requisite intent. In any event, the EEOC has consistently taken the position that documents other than Form 5s may qualify as charges.

regarding the proper interpretation of the EEOC's formally promulgated regulations.[9]

Finally, the Commission has determined that an objective intent requirement benefits all concerned. Persons who have contacted the EEOC will not be unpleasantly surprised to learn that their employers have been notified of charges that they did not intend to operate as formal accusations. The EEOC will not be required to expend already stretched resources investigating perhaps tens of thousands of submissions that were never intended to be formal accusations of unlawful discrimination, or to attempt conciliation in situations "where the employee, on his own, has received satisfaction from the employer." *Bihler* v. *Singer Co.*, 710 F.2d 96, 99

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[9] These Memoranda are also posted on the EEOC's website. See Memorandum (Feb. 21, 2002) <http://www.eeoc.gov/charge/memo-2-21-02.html>; Memorandum (Aug. 13, 2007) <http://www.eeoc.gov/charge/memo-8-13-07.html>.

From February 2, 2005, until September 18, 2007, one of the answers set forth in a database of "Frequently Asked Questions" maintained on the EEOC's website stated that "[y]our charge is filed when the completed, signed Form 5 is received back in the EEOC field office and a charge number has been issued." Although EEOC's preferred practice is indeed to receive a completed Form 5 whenever possible, see p. 21, *infra*, to the extent that this statement suggested that Form 5s are the only documents that may constitute charges, it was inconsistent with EEOC's considered position and past Commission practice. See pp. 15-18, *supra*. Having been made aware of this entry, the EEOC's Director of the Office of Field Programs directed that the following sentence be inserted after the language quoted above: "An intake questionnaire or other correspondence can also constitute a charge under the statutes we enforce if it contains all the information required by EEOC regulations governing the contents of a charge and constitutes a clear request for the EEOC to act." The revised language is available on the Commission's website in the Frequently Asked Questions database under the entry "How do I file a charge of employment discrimination?" EEOC, *FAQs* (visited Sept. 21, 2007) <https://eeoc.custhelp.com/cgi-bin/eeoc.cfg/php/enduser/std_alp.php?p_sid=r9xBKEAh&p_lva=&p_sp=&p_li=>.

(3d Cir. 1983). And employers will not be called upon to respond to submissions that did not constitute formal accusations. Cf. *Edelman*, 535 U.S. at 115 (stating that "it is no small thing to be called upon to respond" to a charge of unlawful employment discrimination).[10]

C. The EEOC's Interpretation Warrants Deference

The EEOC's position—that a "charge" is a submission that contains the elements required by the EEOC's regulations and objectively indicates an intent to make a formal accusation of unlawful conduct against an identified person or entity—reflects a reasonable construction of the ADEA and the Commission's own regulations. Despite the policy objections of petitioner and its amici to the EEOC's interpretation, the Commission's view "simply cannot be said to be unreasonable." *Auer* v. *Robbins*, 519 U.S. 452, 458 (1997); see *Edelman*, 535 U.S. at 114. Accordingly, because the ADEA "entrusts matters of judgment such as this to the [Commission], not the federal courts," this Court should give effect to the EEOC's view. *Auer*, 519 U.S. at 458.

Deference is warranted to the EEOC's interpretation of its own regulations. As in *Auer*, "the underlying regulations g[i]ve specificity to a statutory scheme that the [Commission is] charged with enforcing and reflect the considerable experience and expertise that the [EEOC] ha[s] acquired over time with respect to the complexities of" dealing with the wide variety of submissions it receives from members of the public. *Gonzales*, 546 U.S. at 256; *EEOC* v. *Commercial Office Prods.*

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[10] The EEOC does not track the number of documents it receives per year that satisfy the minimum criteria set forth in 29 C.F.R. 1626.6. In fiscal year 2006, however, the EEOC received 175,334 "inquiries," which include contacts ranging from phone calls through written submissions, and docketed 76,146 "charges," which include Form 5s, intake questionnaires, and other correspondence.

Co., 486 U.S. 107, 125 (1988) (O'Connor, J., concurring in part and concurring in the judgment) ("deference is particularly appropriate" with respect to "technical issue[s] of agency procedure"). In addition, although the EEOC's regulations do not explicitly articulate an objective intent requirement, the definition of "charge" set forth in 29 C.F.R. 1626.3 "comfortably bears" (*Auer*, 519 U.S. at 461) the EEOC's view—reflected in the EEOC Compliance Manual and formal advisory memoranda—that a document is not a charge unless the circumstances objectively indicate an intent to make a formal accusation of unlawful conduct. See note 6, *supra*.

The EEOC's position reflects its expertise in issues of agency procedure. The EEOC has determined that a functional definition that looks to a complainant's intent is appropriate given the reality that most submissions are received from laypersons, who are in all likelihood unaware of the precise legal requirements for initiating proceedings, much less the various forms that the agency employs. See *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1971) (Title VII case) (stating that "technicalities" regarding the charging process "are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process"); accord *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 761 (1979) (making similar observation in ADEA case).[11]

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[11] The EEOC's approach is also in harmony with the maxim that "document[s]" filed by *pro se* litigants "are 'to be liberally construed.' " *Erickson* v. *Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam) (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976)). See, *e.g.*, *Smith* v. *Barry*, 502 U.S. 244, 248-249 (1992) (stating that court of appeals had erred in not considering the possibility that a *pro se* litigant's informal brief could function as a notice of appeal). Equitable tolling should also be available in situations where an EEOC or state official misleads a complainant into believing that a non-qualifying document was, in fact, a charge. See, *e.g.*, *Schlueter* v. *Anheuser-Busch, Inc.*, 132 F.3d 455, 459 (8th Cir. 1998); *Early*, 959 F.2d at 81.

That functional approach allows for some line-drawing in borderline cases, but the EEOC has taken steps to attempt to reduce any uncertainty. As this Court noted in *Edelman*, even in situations where an intake questionnaire or correspondence would constitute a charge under the EEOC's regulations, "[t]he general practice of EEOC staff members [has been] to prepare a formal [Form 5] charge of discrimination for the complainant to review" before a charge is formally docketed. 535 U.S. at 115 n.9. That practice ensures that a person intends to make a formal accusation of unlawful discrimination against an entity before the notice and conciliation process is commenced, benefitting complainants, the EEOC, and employers alike. See pp. 18-19, *supra*.

Despite its advantages in clarifying matters, this approach raises problems in situations where a potentially qualifying submission cannot be transferred to a Form 5 either within the 180/300 day period in which a private complainant is required to file a charge, or soon enough to enable the EEOC to comply with its duty to afford "prompt[] notic[e]" to the accused party. 29 U.S.C. 626(d).[12] In the former situation, the EEOC Compliance Manual has for a number of years directed staff to treat any qualifying submission as a charge and provide notice to the employer. 1 *EEOC Manual* § 2.2(a)(1) and (2), at 2:0001 (Aug. 2002).[13]

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[12] Although the EEOC does not maintain information about how long it takes to transpose information from intake questionnaires or other correspondence to Form 5s, the agency does have internal statistics showing the length of time between initial inquiries (which include phone calls, letters, office visits, and intake questionnaires), and the docketing of ADEA charges. In fiscal year 2006, the total time was less than ten days in the majority of cases (9208 out of 16,595), and the mean period was 28.1 days.

[13] The Chamber of Commerce errs in asserting (at 19-20) that intake questionnaires cannot constitute charges because their disclosure would violate the Privacy Act, 5 U.S.C. 552a (2000 & Supp. V 2005). The ADEA does not require

Moreover, both the February 21, 2002, and the August 13, 2007, Memoranda reiterate that agency policy requires that notice be served within ten days of receipt of any document constituting a "charge" under the test set forth in the EEOC Compliance Manual. App., *infra*, 5a, 7a. The August 13, 2007, Memorandum further instructs that in situations where it does not appear that a completed Form 5 may be obtained and served within ten days, Commission staff are required to "take steps to promptly ascertain whether the submitter intended to initiate proceedings and, if so, docket the questionnaire or other correspondence as a charge and serve notice on the respondent within ten days of receipt." *Id.* at 7a. Such an intent, the Memorandum instructs, "can be inferred from a plain reading of the correspondence or determined by contacting the author/submitter." *Ibid.* Thus, the EEOC has taken concrete steps to ensure that such charges are processed in accordance with its statutory duties.

Finally, the Commission's view is by no means a "*post hoc* rationalization[]" or a "convenient litigating position." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988) (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962)). Although EEOC briefs have not always been consistent in advocating use of the objective intent standard, see note 8, *supra*, the language of current Section 2.2(b) has been contained in the EEOC Compliance Manual since September 1988, and the first of the two Memoranda (App., *infra*, 4a-5a) was issued more than five years ago, long before the EEOC's central office became aware of this case. Cf.

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that employers be served with a copy of the charge; it requires only "notice" that such a charge has been filed. 29 U.S.C. 626(d); see 29 C.F.R. 1626.11. In cases where the EEOC has docketed non-Form 5 documents as charges, it has typically sent notice without serving a copy of the correspondence itself. See, *e.g.*, *Wilkerson*, 270 F.3d at 1316; *Philbin*, 929 F.2d at 322.

Long Island Care at Home, Ltd. v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (deferring to agency interpretation set forth only in an internal document written in response to the litigation then before the Court). In short, "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question," *Auer*, 519 U.S. at 462, and the Commission's interpretation of its own regulations is thus controlling.

D. Respondent's December 3, 2001, Submission Constitutes A "Charge" Under The EEOC's Regulations

Respondent's intake questionnaire and accompanying affidavit possess all the elements required by the EEOC's charge regulations, and contain all of the information that those regulations state that a charge "should" contain. Compare J.A. 265-274, with 29 C.F.R. 1626.6, 1626.8; see Pet. App. 18a. In addition, respondent's December 3, 2001, submission objectively manifests an intent to make a formal accusation of unlawful age discrimination against petitioner. In particular, on the first page of the intake questionnaire, respondent asserts that petitioner has engaged in a pattern of "age discrimination," consents to having her identity disclosed to petitioner, and affirms that she has not "filed an EEOC charge *in the past*." J.A. 265 (emphasis added).

Moreover, respondent, unlike most people who submit intake questionnaires, attached a notarized affidavit outlining her allegations of unlawful discrimination in considerable detail. See *Wilkerson* v. *Grinnell Corp.*, 270 F.3d 1314, 1320-1321 (11th Cir. 2001) (stating that "verification indicates to the filing party that the information must be accurate because it is legally significant"). That affidavit contains blank spaces for a "Case Name" and a "Case No.," J.A. 266, and expresses an understanding that a "case [is] open," *ibid.* Further, the

affidavit closes by calling upon the EEOC to "force [petitioner] to end their age discrimination." J.A. 273.

Neither the pre-printed intake questionnaire that respondent used nor anything respondent wrote on the form or in her affidavit indicates that she did not intend the submission to be a charge. Under the caption of "routine uses," the preprinted text on the second page of the intake questionnaire states that information contained on the form is used by EEOC employees to determine whether the "Commission has jurisdiction over *potential charges*" and to provide "*pre-charge* filing counseling as is appropriate." J.A. 265 (emphases added). But that general language is perfectly consistent with the fact that any submission is a *potential* charge, and that the EEOC does not make a determination whether a submission is in fact a charge until it has reviewed the information and concluded that it meets the form and content requirements of its regulations and manifests the requisite intent. And as a practical matter, a great many intake questionnaires do not meet those requirements. More fundamentally, the focus here is not on how *the EEOC* may have anticipated that a particular form would typically be used, but rather the objective intent of the person who completed it.

The argument that respondent's December 3, 2001, submission is an ADEA charge is substantially stronger than the corresponding argument in *Edelman*. As Judge Luttig noted on remand, Edelman himself characterized the initial letter he sent the Commission "not as a charge, but rather as a request for a charge," his two letters alleged "different discriminatory conduct," and his second letter expressly asked that the EEOC refrain from notifying his employer. *Edelman* v. *Lynchburg Coll.*, 300 F.3d 400, 406 (4th Cir. 2002) (Luttig, J., dissenting). Here, in contrast, nothing respondent wrote in her intake questionnaire or accompanying affidavit manifests a belief that the December 3, 2001, submission is not a charge;

the questionnaire, the affidavit, and respondent's subsequently filed Form 5 all allege the same essential course of discrimination; and respondent's intake questionnaire expressly authorizes the Commission to notify petitioner.

E. The EEOC's Failure To Fulfill Its Statutory Duties After Receiving Respondent's December 3, 2001, Charge Does Not Transform That Charge Into Something Else

Because respondent's December 3, 2001, submission constitutes "a charge alleging unlawful discrimination," the EEOC was obligated by the ADEA "promptly" to notify petitioner and seek to eliminate its allegedly unlawful conduct "by informal methods of conciliation, conference, and persuasion." 29 U.S.C. 626(d). It is undisputed that the EEOC's Tampa field office did neither, and thus failed to fulfill the Commission's statutory responsibilities. As the EEOC's Director of the Office of Field Programs and its General Counsel stated in their August 13, 2007, Memorandum: "That situation should not have occurred." App., *infra*, 7a.

But the EEOC's failure (even when unexcused) to meet its statutory responsibilities does not bar a plaintiff's suit. The statutory text makes a plaintiff's ability to bring suit contingent on her own compliance with various timing rules, and not on the EEOC's compliance with its own statutory duties. See, *e.g.*, 29 U.S.C. 626(d) (providing that "[n]o civil action may be commenced by an individual" absent the filing of a timely charge). The lower courts broadly agree that it is inappropriate "to condition an action for discrimination on the EEOC's performance of its duties." *Wilkerson*, 270 F.3d at 1320.[14]

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[14] See *Forehand* v. *Florida State Hosp.*, 89 F.3d 1562, 1570-1571 (11th Cir. 1996) (failure to certify in early right-to-sue letter that Commission could not process charge within 180 days); *Watson* v. *Gulf & W. Indus.*, 650 F.2d 990, 993-994 (9th Cir. 1981) (failure to name one of proposed defendants in right-to-sue letter); *Russell* v. *American Tobacco Co.*, 528 F.2d 357, 365 (4th Cir. 1975)

And courts have reached the same conclusion in analogous contexts where the initiation of a private suit entails participation of government officials, such as where a United States marshal who has been designated to do so under Federal Rule of Civil Procedure 4(c)(2) fails to make proper service of a *pro se* plaintiff's complaint,[15] or where a court clerk erroneously refuses to accept a complaint for filing within the relevant limitations period.[16]

Basing the determination whether a submission is a charge, or not, on whether the EEOC fulfills its statutory duties also would create the anomalous result that a document filed by one person alleging unlawful discrimination could constitute a charge (when the EEOC fulfills its statutory duties), but the identical document filed by a different party would not constitute a charge (because the EEOC failed to fulfill those duties). There is no evidence that Congress intended to establish a regime that would generate such haphazard results and place the fate of otherwise appropriate charges of unlawful discrimination in the hands of the particular agency employees who happen to receive them.

In addition, any conclusion that the ADEA requires elimination of a private plaintiff's right to sue as a remedy for errors committed by the EEOC would raise questions under *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan*, this Court unanimously concluded that the Illinois

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(failure to serve notice of Title VII charge), cert. denied, 425 U.S. 935 (1976); *Thornton* v. *East Tex. Motor Freight*, 497 F.2d 416, 424 (6th Cir. 1974) (same).

[15] See, *e.g.*, *Sellers* v. *United States*, 902 F.2d 598, 602 (7th Cir. 1990); *Fowler* v. *Jones*, 899 F.2d 1088, 1095 (11th Cir. 1990); *Rochon* v. *Dawson*, 828 F.2d 1107, 1109-1110 (5th Cir. 1987); *Romandette* v. *Weetabix Co.*, 807 F.2d 309, 311 (2d Cir. 1986).

[16] See, *e.g.*, *McDowell* v. *Delaware State Police*, 88 F.3d 188, 191 (3d Cir. 1996); *Lyons* v. *Goodson*, 787 F.2d 411, 412 (8th Cir. 1986) (per curiam); *Loya* v. *Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 281 (9th Cir. 1983).

courts had acted unconstitutionally in dismissing an employee's properly filed charge of disability discrimination because a state commission had failed to comply with its duty to convene a factfinding conference within 120 days. As the Court explained, although a State may certainly condition the right to sue on a *complainant's* compliance with reasonable rules, the state system at issue impermissibly "destroy[ed] a complainant's property interest, by operation of law, whenever the [state commission] fails to convene a timely conference." *Id.* at 436. That was true, the Court held, regardless of whether the commission's action was the result of "negligence, maliciousness, or otherwise." *Ibid.*

Justice Powell likewise observed that the state's scheme was "arbitrary and irrational." *Logan*, 455 U.S. at 444 (concurring in the judgment; joined by Rehnquist, J.). As he explained, "[u]nder this classification, claimants with identical claims, despite equal diligence in presenting them, would be treated differently, depending on whether the Commission itself neglected to convene a hearing within the prescribed time." *Id.* at 443. Since "claimants possessed no power to convene hearings," Justice Powell found it "unfair and irrational to punish [claimants] for the Commission's failure to do so." *Id.* at 444. As noted, the position advanced by petitioner in this case—which similarly ties the validity of a charge to agency action wholly outside a claimant's control—leads to the same type of "arbitrary and irrational" results.

Although the EEOC's failure to fulfill its statutory duties does not bar a plaintiff's suit, a district court may take steps to minimize any prejudice to the defendant in such situations. First, because the defendant was entitled to "prompt[] notice" of the charge, whereas the plaintiff was barred from filing suit for at least 60 days after it was filed, see 29 U.S.C. 626(d), the defendant may seek a stay of the action, including any discovery, for a period not to exceed 60 days to provide an opportu-

nity for conciliation. Second, in the event that a plaintiff who has filed a timely charge nonetheless delays unreasonably in filing suit—certainly if the plaintiff waits "five, ten or twenty years or more after the claims arose" (Pet. Br. 19)—a district court may consider whether dismissal is appropriate under the doctrine of laches or the like.[17]

Finally, where litigation proceeds, the district court should be sensitive to the risk that the defendant's failure to receive timely notice could prejudice its ability to defend itself. For example, the district court should refuse to give any adverse inference instruction—or to permit the plaintiff to ask the jury to draw such an inference—based on the defendant's routine and otherwise lawful destruction of documents or other evidence during the period during which it should have, but had not in fact, been on notice of the plaintiff's alle-

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[17] As for the possibility of having to defend against stale claims (Pet. Br. 18-21), no private action may be brought unless the plaintiff has filed an EEOC charge within the "quite short deadlines" imposed by the statutes that the Commission is charged with enforcing. *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2170 (2007) (quoting *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 825 (1980)). Once a charge has been filed, the only statutory time limits applicable to a private ADEA action are that suit may be filed no less than 60 days after the charge, 29 U.S.C 626(d), and no more than 90 days after the Commission gives notice that it has terminated its own proceedings, 29 U.S.C. 626(e). That regime, however, is the result of deliberate congressional choice. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 115(3), 105 Stat. 1079 (repealing prior cross-reference to the Portal-to-Portal Act, 29 U.S.C. 251 *et seq.*, that had established a limitations period of either two or three years from accrual of a plaintiff's cause of action, depending on whether the conduct was "willful"). If Congress believes that additional time limits are warranted, it is of course free to impose them. In addition, petitioner provides no explanation for why ADEA-protected individuals—persons who, by definition, tend to be older workers—who have made a timely assertion of their rights by filing EEOC charges are likely to then wait years before filing suit and seeking relief in court, and it cites no evidence that this is a serious concern in the circuits that have rejected its position.

gations. In addition, the defendant should be permitted to argue that, had it received timely notification, it would have taken steps to preserve exculpatory evidence.

But when, as here, the EEOC regrettably fails to fulfill its statutory obligations upon receiving a timely charge of unlawful discrimination, nothing in the ADEA, the EEOC's regulations, or common sense entitles defendants to a windfall in the form of the dismissal of a potentially meritorious action for unlawful discrimination under the ADEA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

GREGORY G. GARRE*
Acting Solicitor General

RONALD S. COOPER
General Counsel

VINCENT J. BLACKWOOD
Acting Associate General Counsel

ANNE NOEL OCCHIALINO
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Assistant to the Solicitor General

DENNIS J. DIMSEY
LISA J. STARK
Attorneys

SEPTEMBER 2007

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* The Solicitor General is recused from this case.

APPENDIX

1. 18 U.S.C. 626(d) provides:

Recordkeeping, investigation, and enforcement

* * * * *

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

* * * * *

2. 29 C.F.R. 1626.3 provides:

Other definitions

For purposes of this part, the term * * * charge shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospec-

tive defendant has engaged in or is about to engage in actions in violation of the Act * * *.

3. 29 C.F.R. 1626.6 provides:

Form of charge

A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing.

4. 29 C.F.R. 1626.8 provides:

Contents of charge; amendment of charge

(a) In addition to the requirements of § 1626.6, each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge;

(2) The full name and address of the person against whom the charge is made;

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;

(4) If known, the approximate number of employees of the prospective defendant employer or members of the prospective defendant labor organization.

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of § 1626.6.

(c) A charge may be amended to clarify or amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not again be referred to the appropriate State agency.

5. The Feb. 21, 2002, Memorandum provides:

[Seal Omitted]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507 www.eeoc.gov

February 21, 2002

MEMORANDUM

To: All District, Area, and Local Office Directors
Washington Field Office Director

FROM : Elizabeth M. Thornton, Director /s/
Office of Field Programs

SUBJECT : **NOTIFYING RESPONDENTS OF RECEIPT OF MAIL CHARGES**

In helping the Solicitor General's Office prepare for a Supreme Court argument, we learned that some field offices may not be consistently giving timely notice of charges received by mail. This memorandum re-emphasizes the importance of giving notice within 10 days of receipt of a document that clearly constitutes a charge, even if we do not send a copy of the document itself.

In the case that was heard, the charging party, who lived some distance from our field office, sent us a charge letter 160 days after the date of alleged discrimination. His multi-page letter set out specific allegations, stated that it was a charge of discrimination, and asked us to investigate. Our office treated the letter as a charge and began its intake process,

but overlooked notifying the employer until after receiving a signed verified charge form on the 313th day.

The office's failure to send a timely notice was a mistake. When correspondence contains all the information necessary to begin investigating, constitutes a clear and timely request for EEOC to act, and does not express concerns about confidentiality or retaliation, we should docket it as a charge; acknowledge it by Letter 2-B; and serve a copy on the respondent by Form 131. EEOC Compl. Man., Vol. 1, §§ 2.2(b) and 2.7.

Please also remember that the respondent may be notified without a copy of a charge when staff determines that sending a copy of the charge "would impede the law enforcement functions of the Commission." 29 C.F.R. § 1601.14(a). Section 3.6 of Vol. I lists situations that justify not sending a copy of the initial charge document along with Form 131. However, just to be clear, if the charge document is not sent, Form 131 must still be sent (complete the "Circumstances" block with all the relevant bases, issues, and, if the alleged matters took place at location(s) other than where the form is addressed, all the relevant location(s).)

In short, Title VII, the ADA and EEOC policy require that when you receive charge correspondence meeting the requirements of Compliance Manual § 2.2(b), it should be docketed and the respondent must be notified within 10 days - either by Form 131 with a copy of the correspondence or by Form 131 alone. Please ensure that this reminder is sent to all staff.

cc: Jacqueline R. Bradley, Director FMP.
Nicholas M. Inzeo, Acting Deputy General Counsel

6. The Aug. 13, 2007, Memorandum provides:

[Seal Omitted]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

August 13, 2007

MEMORANDUM

TO: All District, Field, Area, and Local Office Directors

FROM NICHOLAS M. INZEO, Director
/s/ NICHOLAS M. INZEO
Office of Field Programs

RONALD S. COOPER
/s/ RONALD S. COOPER
General Counsel

SUBJECT Timely Notification to Respondents of Receipt of Intake Questionnaires or other Correspondence Constituting Charges

The Supreme Court will be considering a case raising the issue of whether a minimally sufficient intake questionnaire that manifested the complainant's intent to file a charge constitutes a charge for timeliness purposes, even though the EEOC failed to docket it and notify the employer. *See Federal Express Corp. v. Holowecki*, No. 06-1322 (U.S.). Although the Court of Appeals found the questionnaire to be a charge, the district court in this case, as well as another circuit court, held that in these circumstances a questionnaire does not constitute a charge, resulting in the loss of the plaintiff's suit rights.

Our field office neglected to send a timely notice of the intake questionnaire. That situation should not have occurred, and this guidance is intended to insure that timely notice of charges is sent. An intake questionnaire or other correspondence can constitute a charge under the statutes we enforce if it contains all the information required by EEOC regulations governing the contents of a charge and constitutes a clear request for the agency to act. EEOC Compl. Man., Vol. I, §§ 2.2(b) and 2.7.

Under the statutes EEOC enforces, we are required to provide notification to the respondent once we receive a charge. Title VII and the ADA provide for EEOC to notify respondents within 10 days of receiving a charge. The ADEA similarly provides for EEOC to provide "prompt[]" notice of a charge. Accordingly, if it appears that a perfected charge cannot be docketed and served within ten days of receipt of a correspondence meeting the minimal requirements of a charge, be it a letter or intake questionnaire, staff must take steps to promptly ascertain whether the submitter intended to initiate proceedings and, if so, docket the questionnaire or other correspondence as a charge and serve notice on the respondent with ten days of receipt. Intent can be inferred from a plain reading of the correspondence or determined by contacting the author/submitter. Staff should send respondent notice by mailing a Form 131 accompanied by the charge or by mailing only Form 131 (in situations where sending the charge "would impede the law enforcement function of the Commission)."

These instructions should be sent to all Enforcement and Legal Staff.

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SUPREME COURT, U.S.

2508

No. 06-1322

In The
Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

PAUL HOLOWECKI, *et al.*,
Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the Second Circuit

BRIEF *AMICI CURIAE* OF AARP, THE ASIAN AMERICAN JUSTICE CENTER, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NATIONAL WOMEN'S LAW CENTER AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENTS

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OTHER SOURCES

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BRIEF *AMICI CURIAE* OF AARP, THE ASIAN AMERICAN JUSTICE CENTER, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NATIONAL WOMEN'S LAW CENTER AND PEOPLE FOR THE AMERICAN WAY FOUNDATION

INTEREST OF THE *AMICI*[1/]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Almost half of AARP's more than 39 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), Title VII, and various state laws. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

The Asian American Justice Center (AAJC) is a national non-profit, non-partisan organization whose mission is to advance the civil and human rights of Asian Americans. Collectively, AAJC and its Affiliates the Asian Law Caucus, the Asian Pacific American Legal Center of Southern California, and the Asian American Institute have over 50 years of experience in providing legal public policy, advocacy, and

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[1/] Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici curiae*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.3 (a), written consent to the filing of this brief has been obtained from counsel for Petitioner and Respondents, and the documents confirming consent have been submitted to the Clerk's office.

community education on discrimination issues. The question presented by this case is of great interest to AAJC because it implicates the availability of civil rights protections for Asian Americans in this country.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The National Partnership for Women & Families is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement of anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 and other laws that protect employees. NWLC has prepared or participated in numerous *amicus* briefs filed with this Court in employment discrimination cases.

People For the American Way Foundation ("PFAWF") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 1,000,000 members and activists nationwide. PFAWF has been actively involved in litigation and other efforts to combat discrimination, and is particularly concerned that Americans have access to the courts to enforce their right to a workplace free of unlawful discrimination. PFAWF joins this brief to help vindicate that important right.

Amici collectively represent or are otherwise concerned with the interests of constituents of the Equal Employment Opportunity Commission (EEOC or Commission): employees who file charges alleging that they have suffered employment discrimination, harassment, a denial of reasonable accommodation or retaliation in violation of federal law. *Amici* deny the very premise of petitioner's argument — that, despite filing a complaint in writing in compliance with the EEOC's regulations, an employee may forfeit the right to bring a civil action if the EEOC fails to carry out its statutory duty to notify the employer and attempt informal resolution. (Although this case arises under the ADEA, it also affects employees seeking to bring suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*) Because of the gross unfairness this would visit upon employees who cannot influence the EEOC's discharge of its own duties, *amici* urge enforcement of an EEOC regulation long in effect governing the contents of an ADEA "charge," 29 C.F.R. § 1626.6, to which deference is appropriate under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that makes clear respondent satisfied her charge-filing obligation.

SUMMARY OF THE ARGUMENT

The petitioner suggests, in its "question presented," that an employee who timely complains of age discrimination in writing to the EEOC may lose her right to commence a civil

action if the Commission does not treat the form as a charge, by providing notice to the employer or attempting voluntary conciliation. Based on the petitioner's reasoning, even the submission of an undisputed charge, i.e., an EEOC Form 5, might not qualify as a "charge" depending on the response by the EEOC. To extinguish an employees' right to file suit because of the Commission's inactivity takes us back to the doorstep of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In that case, this Court unanimously invalidated a provision of the Illinois Fair Employment Practices Act that would have terminated an employment discrimination claim if the state administrative agency with jurisdiction failed to convene a fact-finding hearing within 120 days. The Court held that "the Due Process Clauses protect civil litigants who seek recourse in the courts," including "plaintiffs attempting to redress grievances." *Id.* at 429. Thus, *Logan* disapproved forfeiture of a claim of employment discrimination by government inaction.

Respondent Patricia Ann Kennedy finds herself in the same peril that the plaintiff in *Logan* faced 25 years ago. The ADEA provides that it is the EEOC's duty to serve notice of the employee's charge promptly on the employer and seek informal resolution under section 7(d), 29 U.S.C. § 626(d).[2/] Yet when the EEOC received Ms. Kennedy's detailed allegations of age bias — which met the regulatory requirements for an ADEA charge, 29 C.F.R. § 1626.6 — it failed to carry out its duty to docket her case and notify the employer, petitioner Federal Express Corporation ("FedEx"). FedEx seizes on this administrative default as a basis to avoid her (and ten other employees') claims.

To rely on the EEOC's failure to act on Ms. Kennedy's charge would make the employee warrantor for the

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[2/] Section 7(d) mandates that "[u]pon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice and informal methods of conciliation, conference, and persuasion."

Commission's errors. With 15,000 to 20,000 ADEA charges filed with the EEOC each year (and 60,000 to 65,000 charges under other statutes enforced by the Commission),[3] experience tells us that sometimes the Commission will fail to carry out its duties under section 7(d), just as the Illinois Fair Employment Practices Commission in *Logan* sometimes neglected to convene a timely hearing. But in FedEx's view, the EEOC's failure to process the charge voids respondents' claims *latae sententiae*, without the benefit of notice to or a hearing for the employee. Under *Logan*, this notion is unacceptable.

Ms. Kennedy's only duty was to file a charge, and her submission met the conditions of the relevant regulation. Claimants before the EEOC have no duty to exhaust administrative procedures. *Woodford v. Ngo*, 126 S. Ct. 2378, 2390-91 (2006). Congress placed no further duty on employees to serve notice of a charge on employers. Nor must employees be expected to prod the Commission into action. Because employees "possess[] no power" to compel the EEOC to carry out its duties, it would be "unfair and irrational to punish them for the Commission's failure to do so." *Logan*, 455 U.S. at 443-44 (Powell, J., concurring in the judgment).

For these reasons, as further elaborated below, FedEx's attempt to shift the burden of default onto the employee must fail. The Second Circuit's decision recognizing Ms. Kennedy's Intake Questionnaire and affidavit as an ADEA charge, and allowing her case to proceed, should therefore be affirmed.

ARGUMENT

I. BUREAUCRATIC FORFEITURE OF A PRIVATE CAUSE OF ACTION OFFENDS DUE PROCESS

An employer charged with employment discrimination should not escape liability just because the Commission

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[3] U.S. Equal Employment Opportunity Commission, Charge Statistics, FY 1996-2006, http://www.eeoc.gov/stats/charges.html (last visited Aug. 31, 2007).

blundered. *See People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.). In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), this Court held that an employee's claim under an anti-discrimination statute was a property right protected by the Due Process Clause of the Fourteenth Amendment, which may not be extinguished without notice and a right to be heard. So even if the Commission failed to act here, under *Logan* that omission cannot by itself terminate Ms. Kennedy's claim.

Laverne Logan filed a charge with the Illinois Fair Employment Practices Commission alleging disability discrimination. The charge triggered a 120-day period for the Commission to convene a fact-finding conference under ¶ 858(b),[4/] but "[a]pparently through inadvertence, the Commission's representative scheduled the conference for . . . five days *after* expiration of the statutory period." *Id.* at 426 (emphasis in original). The employer filed an original writ of prohibition in the state supreme court to bar the belated proceedings. The Illinois Supreme Court granted the relief, holding the 120-day period to be jurisdictional. *Id.* at 427. It found that the 120-day period comported with due process because it promoted "just and expeditious" resolution of disputes. *Id.*

This Court unanimously reversed. While the justices varied in their analyses of the constitutional issues, a majority agreed with the proposition that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Id.* at 428. *See also Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988) ("[l]ittle doubt remains that such an intangible interest [in a cause of action] is property protected by the Fourteenth Amendment"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311-15 (1950) (cause of action held to be a property right). *Logan* held that the employee's claim of

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[4/] The Illinois act provided that "[w]ithin 120 days of the proper filing of a charge, the Commission *shall* convene a fact finding conference . . ." *Id.* at 427.

discrimination under the Illinois Fair Employment Practices Act was a property right. *Logan*, 455 U.S. at 430-31. The Court also construed the rule dismissing unheard claims in 120 days as a "procedural limitation on the claimant's ability to assert his rights, rather than a substantive element of the FEPA claim." *Id.* at 433.

The Court also held that the employee's claim could not be extinguished "without first giving the putative owner an opportunity to present his claim of entitlement" *Id.* at 434. As the majority held:

> Logan's interests in retaining his employment, in disproving his employer's charges of incompetence or inability, and — more intangibly — in redressing an instance of alleged discrimination, are all substantial. At the same time, the deprivation here is final; Logan, unlike a claimant whose charge is dismissed on the merits for lack of evidence, cannot obtain judicial review of the Commission action. A system or procedure that deprives persons of their claims in a random manner, as is apparently true of ¶ 858(b), necessarily presents an unjustifiably high risk that meritorious claims will be terminated. And the State's interest in refusing Logan's procedural request is, on this record, insubstantial. [*Id.* at 434-35]

Justice Powell's concurring opinion sounded the same theme, while applying a rational-basis test: "[C]laimants with

identical claims, despite equal diligence in presenting them, would be treated differently, depending on whether the Commission itself neglected to convene a hearing within the prescribed time . . . As claimants possessed no power to convene hearings, it is unfair and irrational to punish them for the Commission's failure to do so." *Id.* at 443-44.

Despite the unanimous and enduring *Logan* precedent, petitioner's argument simply reiterates Zimmerman Brush's defense of decades ago. FedEx demands default of the employee's claim if the EEOC does not carry out its statutory duties of notice and informal resolution. *See* Petitioner's Brief at 9 (ADEA "requires dismissal of any lawsuit" if the EEOC does not give notice to the employer and initiate informal resolution); 12 (respondent's charge was invalid because "[t]he EEOC did not assign the questionnaire a charge number . . . did not notify FedEx of [the] allegations . . . [a]nd did not commence an investigation or efforts to resolve" the claims).

FedEx's argument fails under the reasoning of *Logan*. There is no evidence in the record that Ms. Kennedy knew or should have known that the EEOC failed to docket her charge or take action on it. Even if she had known, the employee has no means to compel the EEOC to take action on a charge. *See Smith v. Casellas*, 119 F.3d 33, 34 (D.C. Cir. 1997) ("Congress has not authorized, either expressly or impliedly, a cause of action against the EEOC for the EEOC's alleged negligence or other malfeasance in processing an employment discrimination charge"); *Scheerer v. Rose State Coll.*, 950 F.2d 661, 663 (10th Cir. 1991) ("[t]he circuits which have addressed the issue have uniformly held that no cause of action against the EEOC exists for challenges to its processing of a claim").

As the Tenth Circuit noted earlier this month, in holding that an Intake Questionnaire may serve as a Title VII charge:

> If we were to make notice to the employer a determining factor for exhaustion, the plaintiff would bear the burden of the EEOC's failure in handling a

> charge. But it is the EEOC's, not the plaintiff's, duty to provide the charged party with notice within ten days after a charge is filed, *see* 29 C.F.R. §1601.14(a); a plaintiff should not be penalized for the EEOC's negligence in handling a charge.

Jones v. United Parcel Service, 2007 WL 2677141 at *6 (10th Cir. Sept. 13, 2007) (Tacha, C.J.). *See also* 29 C.F.R. § 1626.11 (under ADEA, "[u]pon receipt of a charge, the Commission shall promptly notify the respondent that a charge has been filed."); Memorandum dated February 21, 2002 from Elizabeth M. Thornton, Director /s/ OFFICE OF FIELD PROGRAMS TO "ALL DISTRICT, AREA, AND LOCAL OFFICE DIRECTORS" (published at http://www.eeoc.gov/charge/memo-2-21-02.html) ("In helping the Solicitor General's Office prepare for a Supreme Court argument, we learned that some field offices may not be consistently giving timely notice of charges received by mail. This memorandum re-emphasizes the importance of giving notice withing 10 days of receipt of a document that clearly constitutes a charge, even if we do not send a copy of the document itself.")

The experience of the Age Discrimination Claims Assistance Act of 1988 casts further doubt on FedEx's argument. In the 1980s, Congress found that the EEOC had fallen behind in the processing of ADEA charges. Pub. L. 100-283, Apr. 7, 1988, 102 Stat. 78, § 1. At that time, the limitations period for an ADEA case was two or three years, borrowed from the Fair Labor Standards Act (FLSA), 29 U.S.C. § 255(a). (Congress later amended this period in the Civil Rights Act of 1991 to allow an ADEA suit to be brought within 90 days of receipt of a right-to-sue letter from the EEOC, 29 U.S.C. § 626(e)). The EEOC's delay imperiled an undetermined number of ADEA claimants, whose charges languished while the two-to-three year clock ticked down (or in some instances, ran out). Pub. L. 100-283, Apr. 7, 1988, 102 Stat. 78, § 2 ("many persons who filed such charges with the Commission have lost the right to bring private civil actions

with respect to the unlawful practices alleged in such charges"). Instead of allowing employers to reap the benefit of the EEOC's systemic delays (with many claims irredeemably time-barred), Congress — at the urging of *amicus* AARP and others — extended or reactivated limitations periods on the then-pending or expired claims so that employees would have 180 additional days to file. *Id.*, § 3. It also required that the EEOC serve notice on the charging parties to inform them of their rights under this act. *Id.*, § 4.

Forfeiture of discrimination claims by inadvertence is a discredited concept under *Logan*. *See also Edelman v. Lynchburg College*, 535 U.S. 106, 115 (2002) (construing section 706 of Title VII to "ensure[] that the lay complainant, who may not know enough to verify [a charge] on filing, will not risk forfeiting his rights inadvertently"). *Logan* exposes the errors in FedEx's argument.

II. FEDERAL LAW DOES NOT PLACE THE BURDEN OF EEOC COMPLIANCE ON THE EMPLOYEE

FedEx and its *amici* backers struggle to find a way to hold Ms. Kennedy comparatively negligent for the EEOC's inaction. Two arguments are advanced: that Ms Kennedy failed to "exhaust" administrative remedies, and that she failed to file a timely "charge" within the intent of section 7(d) of the ADEA. Neither finds support in the law or record. We first refute the exhaustion argument (EEAC *Amicus* Br. at 5-6, 8, 12, 14; Chamber of Commerce *Amicus* Br. at 4-5), and then show, in the next section, that Ms. Kennedy's Intake Questionnaire and affidavit constitute a complete ADEA charge.

Federal law nowhere mandates exhaustion of administrative remedies with the EEOC, at least for private-sector employees. *Woodford v. Ngo*, 126 S. Ct. 2378, 2390-91 (2006) (describing ADEA and Title VII procedures, noting that "[n]either of these provisions makes reference to the concept of exhaustion, and neither is in any sense an exhaustion provision"). The ADEA is especially clear on this point. Under section 7(d) the employee need only file the charge with

the Commission, then wait 60 days to file a civil action ("[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]"). An ADEA claimant may, but need not, wait until the charge "is dismissed or the proceedings of the Commission are otherwise terminated by the Commission" before filing a civil action (29 U.S.C § 626(e)). A federal sector employee under the ADEA need not even file a charge, but must only give the Commission "thirty days' notice of an intent to file such an action" before commencing a civil lawsuit. 29 U.S.C. § 633a(d). *See generally Stevens v. Department of Treasury*, 500 U.S. 1, 5-6 (1991).

Congress can, of course, draft remedial statutes that require administrative exhaustion as a precondition to suit. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 723 n.12 (2005) ("a prisoner may not sue under RLUIPA without first exhausting all available administrative remedies") *citing* 42 U.S.C. § 1997e(a) ("[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted"); *Schweiker v. Chilicky*, 487 U.S. 412, 424 (1988) (setting out administrative exhaustion rules for Social Security benefits under 42 U.S.C. § 421(a)); *Smith v. Robinson*, 468 U.S. 992, 1020 n.22 (1984) (referring to exhaustion of administrative remedies under section 504 of the Education of the Handicapped Act). But it did not do so here — other than the minimal requirement that a charge be filed.

Courts have also, now and then, inferred administrative exhaustion requirements. Even then, "[o]f 'paramount importance' to any exhaustion inquiry is congressional intent." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (*quoting Patsy v. Board of Regents*, 457 U.S. 496, 518 (1982)). "[C]ourts are guided by congressional intent in determining whether application of the [administrative exhaustion] doctrine would be consistent with the statutory scheme." *Patsy*, 457 U.S. at 502 n.4. As this Court found in *Woodford*, Congress did

not intend to have exhaustion requirements imposed beyond those spelled out in the employment discrimination statutes.

The only hint of exhaustion under the ADEA involves actions by the Commission itself in its own enforcement capacity: before it may institute an lawsuit, the EEOC under section 7(b) "shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(b). This does not bear on Ms. Kennedy, who commenced her own civil action.

The ADEA does not even call for employees to serve notice of the charge on the employer. Section 7(d) of the ADEA confers that duty on the EEOC. Federal employees, instead of filing a charge, may instead file a notice of intent to sue on the Commission and by-pass the administrative procedure (29 U.S.C. § 633a(d)). Even then, the Commission is charged with "promptly notify[ing] all persons named therein as prospective defendants in the action." This is not a situation, such as under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, and numerous other federal statutes, where Congress charges the aggrieved party with notifying the other side of the intent to sue. *See, e.g., Hallstrom v. Tillamook Co*, 493 U.S. 20, 23 (1989) (citing statutes with similar notification requirements).

In sum, any argument based on a theory of administrative exhaustion is ill-founded and wholly unsupported by a close reading of the statute or relevant case law. For completeness sake, the result would be no different if this case arose under Title VII, though the analysis would differ slightly. Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), as interpreted by this Court, requires that a complainant who "initially institutes proceedings with a state or local agency with authority to grant or seek relief from the practice charged" must "file a charge" with that agency, or "have the EEOC refer the charge to that agency, within 240 days of the alleged discriminatory event...." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 110-111 (1988). The Commission then has

a specified ten days to serve notice, and an obligation to investigate, under section 706(b), 42 U.S.C. § 2000e-5(b). After 180 days, if the Commission (or Attorney General) has not filed a civil action, dismissed the charge or entered into a conciliation agreement, it may then serve notice on the claimant (known as a "right-to-sue" letter) who may within 90 days file a civil action under section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1). Receipt of the notice, though a precondition to suit, does not require proceedings before the EEOC and may be requested by the employee before the Commission even begins its investigation. 29 C.F.R. § 1601.28(a). As with the ADEA, it is the EEOC, not the employee, that has the obligation to take these actions. Except for federal employees,[5/] both Title VII and the Americans with Disabilities Act (ADA) (the latter governed by Title VII enforcement standards, 42 U.S.C. § 12117) impose no exhaustion requirement. *See, e.g., Doe v. Oberweis Dairy*, 456 F.3d 704, 710 (7th Cir. 2006) (Posner, J.) ("Title VII does not incorporate anything like the full apparatus of exhaustion, an apparatus designed as we have noted for cases in which judicial review of an adjudication or a rule is sought").

III. CONTROLLING EEOC REGULATIONS SPELL OUT WHAT IS REQUIRED TO APPEAR IN A CHARGE

The term "charge" is not defined in the ADEA or Title VII. *Edelman v. Lynchburg College*, 535 U.S. 106, 112 (2002) (neither section 706(b) nor section 706(e)(1) of Title VII "defines 'charge,' which is likewise undefined elsewhere in the statute"). In the absence of a statutory definition, it is within the EEOC's discretionary authority to adopt regulations

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[5/] Title VII apples to federal employment by way of section 717, 42 U.S.C. § 2000e-16. Federal employees file their complaints directly with the agency that employs them, rather than with the EEOC. 42 U.S.C. § 2000e-16(c). Section 717(b) provides an administrative mechanism, while section 717(c) allows a claimant to file a civil action in federal district court, though only after exhausting administrative remedies. *See generally Loeffler v. Frank*, 486 U.S. 549, 559 (1988).

construing that term, whether the regulations be deemed procedural (under Title VII, 42 U.S.C. 2000e-12(a))[6] or substantive (under the ADA or the ADEA).[7] Ms. Kennedy followed the applicable regulation, 29 C.F.R. § 1626.6, and FedEx does not dispute its validity. Petitioner's Br. at, 3-4, citing the regulation).

Regarding ADEA claims, the EEOC (at 29 C.F.R.§ 1626.6) requires only that a "charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing."[8] 29 C.F.R. § 1626.8(a) recommends other items that "should" appear in an ADEA charge,[9] but clarifies in subsection (b) that

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[6] Under Title VII, the EEOC may "issue, amend, or rescind suitable procedural regulations to carry out the provisions of [Title VII]. Regulations issued under this section shall be in conformity with the standards and limitations of" the Administrative Procedure Act. 42 U.S.C. § 2000e-12(a).

[7] The ADA states that "Not later than 1 year after [the date of enactment of this Act], the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5." 42 U.S.C § 12116. Section 9 of the ADEA provides that "[i]n accordance with the provisions of subchapter II of chapter 5 of Title 5, the [EEOC] may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter . . . ." 29 U.S.C. § 628. Neither section is limited to procedural rules.

[8] *See also* 29 C.F.R. § 1626.3 (a "charge shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act").

[9] Subsection (a) of that regulation provides:

> (a) In addition to the requirements of Sec. 1626.6,

"[n]otwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives

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each charge should contain the following:

> (1) The full name, address and telephone number of the person making the charge;
>
> (2) The full name and address of the person against whom the charge is made;
>
> (3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;
>
> (4) If known, the approximate number of employees of the prospective defendant employer or members of the prospective defendant labor organization.
>
> (5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State agency charged with the enforcement of fair employment
>
> practice laws and, if so, the date of such commencement and the name of the agency.

A Title VII or ADA charge need likewise furnish only minimal information to invoke the administrative process. 29 C.F.R. § 1626.8(b) ("a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of"). The only significant difference between the ADEA and Title VII regimes is that Title VII and ADA charges must be verified. 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.12(b).

from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of Sec. 1626.6." FedEx nowhere disputes that Ms. Kennedy's submission to the EEOC was in writing and otherwise satisfied the conditions to constitute a valid charge (JA265-74).

Were there any doubt at all in the matter, the EEOC's regulations defining a charge warrant this Court's *Chevron* deference (*Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984)). As the Court found in *Chevron USA Inc. v. Echazabal*, 536 U.S. 73 (2002), a reasonable EEOC regulation promulgated within the agency's rule-making authority ought to be enforced. Reviewing an ADA regulation defining the "direct threat" defense, the Court unanimously held that "the EEOC's resolution exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to the administrative leeway found in 42 U.S.C. § 12113(a)." *Id.* at 85.

More specifically, this Court in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), reviewed the Title VII charge-filing requirements and affirmed a rule allowing charging parties to verify charges by amendment, with the amendment relating back to the original charge. Three concurring justices in *Edelman* would have deferred outright to the EEOC's procedural regulation (29 C.F.R. § 1601.12(b)). *Edelman*, 535 U.S. at 119 (Thomas, J., concurring) and 120-21 (O'Connor, J., with whom Scalia, J., concurs in the judgment). The majority signaled their approval of the rule, without specifically addressing the issue of agency deference. *Id.* at 114.

Like the "direct threat" regulation considered in *Echazabal* and the verification requirement reviewed in *Edelman*, the EEOC's regulations about the content of a charge — a gap Congress left to be filled by the agency — reflect a balancing between the employer's interest in knowing the dimension of the claim and the employee's often straitened access to evidence in the early stages of a discrimination case. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002)

("[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case").

Of course, most employees will include sufficient detail in their charge to inform employers of the outlines of their claim. Many *pro se* employees receive assistance from intake officers who help draft the charges and are presumably mindful of the kinds of facts that the Commission needs to complete an investigation. Employees represented by counsel in the charging process, meanwhile, will be even more expansive because plaintiffs' attorneys know that federal courts often dismiss civil actions that are not supported by facts appearing in the charge. B. LINDEMANN AND P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, ch. 28, 1894-1901 (4th ed. 2007) (setting forth extensive U.S. Court of Appeals authority evaluating whether an employee's claims are like or reasonably related to the contents of the EEOC charge). Few charges in the real world are likely to resemble the minimalist model suggested in the regulations. (Observe Ms. Kennedy's charge, for instance, which provided unstinting detail about her claims.)

FedEx must therefore resort to a back-up argument, against the grain of the regulation, that Ms. Kennedy "could not have reasonably believed that her intake questionnaire would be treated or sufficed as a charge" (Petitioner's Br. at 27). Even if such a state-of-mind requirement exists — and none is suggested by the statutes or regulations (see the next section) — the evidence in the Joint Appendix (JA265-74) does not support the petitioner. The Intake Questionnaire Form 283 (JA265) nowhere warns that it is not a charge or that it may not be used to initiate a claim. Indeed, the employee checked off that she consented to her name being "disclosed to the organization which allegedly discriminated against you." The Privacy Act disclaimer on the reverse side states that "[i]nformation provided on this form may be disclosed to other State, local and federal agencies as may be appropriate or necessary to carrying out the Commissions's functions," suggesting strongly that filing this paper does initiate an investigation. The only hint that this document may not be a

charge by itself is the disclosure (in the same paragraph) that Form 283 is used for "pre-charge filing counseling as is appropriate." The reference is so obscure that only a lawyer steeped in anti-discrimination law could be expected to spot it.

FedEx infers (incorrectly) that Ms. Kennedy received assistance from an attorney (Petitioner's Br. at 27),[10/] yet this point is irrelevant. The Court's ordinary standard of construction which assumes the norm of a *pro se* charge. In *Love v. Pullman Co.*, 404 U.S. 522 (1972), this Court eschewed a narrow, technical construction of the charge-filing requirement as "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Id.* at 527. *See also Edelman*, 535 U.S. at 115 (construing Title VII charge-filing rule from the perspective of "the lay complainant, who may not know enough to verify [a charge] on filing, will not risk forfeiting his rights inadvertently"); *Hallstrom*, 493 U.S. at 28 ("the initial charge in a Title VII proceeding is normally filed by an aggrieved individual"); *Commercial Office Products Co.*, 486 U.S. at 124 (Title VII has a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process"); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (avoiding "technical reading" of the charge-filing rule).

IV. THE COURT SHOULD REJECT THE "MANIFEST INTENT" STANDARD INTERPOSED BY THE LOWER COURTS

The Second Circuit applied what it called a "manifest intent" test to determine whether Ms. Kennedy intended to invoke the EEOC's investigatory machinery. *Holowecki v.*

[10/] To the contrary, the Intake Questionnaire appears to have been produced originally without assistance of counsel. On the form, Ms. Kennedy checked that she had not "sought the assistance about the action" from an attorney (JA265). As further evidence that she prepared the Intake Questionnaire without assistance of counsel, Ms. Kennedy lists FedEx as having approximately "100" employees, an error that an attorney would be far less likely to make.

Federal Exp. Corp., 440 F.3d 558, 566 (2d Cir. 2006). However, the court below acknowledged that the "manifest intent" requirement does not originate from the statute or regulations, but is simply interposed by the courts. "Some Circuits have imposed an additional requirement, the 'manifest intent' rule, that is not explicitly stated in the statute or interpreting regulations." *Id.* at 566-67. Yet Congress entrusted the EEOC — not the judiciary — with authority to decide what ought to be contained in documents that initiate an investigation before it. The "manifest intent" test, a judicial postscript to the regulations, should not be adopted here. The judiciary's role is to enforce the agencies' duly-authorized regulations, not to improve upon them. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) ("[w]hen Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' *Chevron*, 467 U.S., at 843-844, 104 S. Ct. 2778, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute"). If a claimant's charge meets the Commission's regulatory minima, then no more may be required.

CONCLUSION

For the above stated reasons, the *amici* respectfully request that the Court affirm the Court of Appeals and remand for further proceedings.

September 24, 2007

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FEDERAL EXPRESS CORPORATION,

Petitioner,

v.

PAUL HOLOWECKI, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue this Court has examined but not yet decided, that an "intake questionnaire" submitted to the Equal Employment Opportunity Commission ("EEOC" or the "Commission") may suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA" or the "Act"), even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.

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Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing By Mandatory Mediation*, 105 Dick. L. Rev. 305 (2001) 18

EEOC, *Charge Statistics – ADEA*, http://www.eeoc.gov/stats/adea.html 7

EEOC, *Charge Statistics – All Statutes*, http://www.eeoc.gov/stats/all.html 7

Dr. E. Patrick McDermott, *An Evaluation of the EEOC Mediation Program EEOC Mediation Program* (Sept. 20, 2000), *available at* http://www.eeoc.gov/mediate/report/index.html 16

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

Many of the Chamber's members are employers subject to the ADEA, as well as other equal employment laws and regulations. As employers and potential respondents to charges of age discrimination under the ADEA, many of the Chamber's members have a significant interest in the issues raised by this case.

The Chamber seeks to assist the Court by highlighting the impact its decision in this case will have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of its experience in these matters, the Chamber is well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.3(a), written consent to the filing of this brief has been obtained from counsel for Petitioner and Respondents, and the documents confirming consent have been submitted to the Clerk's office.

SUMMARY OF THE ARGUMENT

The Second Circuit allowed Patricia Kennedy and those piggybacking on her claim (collectively "Kennedy") to proceed with litigation without having first filed an appropriate charge of discrimination with the EEOC. The Second Circuit's decision should be reversed because it misinterprets the statutory and regulatory scheme that empowers the EEOC to appropriately address claims of employment discrimination prior to litigation. Were the EEOC intended to be a mere ticket taker *en route* to federal court, the Second Circuit's approach would be adequate. However, Congress charged the EEOC with interpreting, administering, and enforcing the ADEA (and similar statutes) and to investigate and resolve instances of discrimination.

Allowing Kennedy to bypass the administrative procedures established by Congress prevents the EEOC from discharging its duties of notice and conciliation under the ADEA. If the EEOC understands the claimant's lodging of an intake questionnaire to be preliminary, it does not notify the employer of the charge, nor does it seek conciliation between the employer and the claimant. The decision below frustrates the statutory design of the ADEA, which seeks to encourage pre-litigation resolution of claims. The purpose of the statutory scheme is not to prolong claims and engage in a legal game of "gotcha," but to surface issues, identify problems, and where possible, promptly abate the offending practice.

The Second Circuit's suggestion that an intake questionnaire may routinely function as a charge creates a host of practical problems that interfere with the EEOC's ability to efficiently process claims. Such practical problems

have significant repercussions for employers, claimants, the courts and the EEOC where the agency's inability to process claims undermines its mission of eradicating employment discrimination.

Finally, because intake questionnaires are governed by the Privacy Act of 1974, 5 U.S.C. § 522a (the "Privacy Act"), the EEOC cannot disclose the information contained within the questionnaire without the claimant's written consent. The Second Circuit's decision thus complicates the EEOC's ability to comply with its statutory obligation to provide notice to employers without violating the provisions of the Privacy Act.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION SHOULD BE REVERSED BECAUSE IT DEPRIVED THE EEOC OF THE OPPORTUNITY TO DISCHARGE ITS DUTIES OF NOTICE AND CONCILIATION UNDER THE STATUTORY AND REGULATORY SCHEMES, AND IS UNSUPPORTED BY EXISTING CASE LAW

A. The Second Circuit Abused Its Discretion By Allowing Kennedy To Bypass The ADEA's Administrative Remedies

Section 7(d) of the ADEA, 29 U.S.C. § 626(d), provides that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]." Upon "receiving such a charge," the Commission "*shall promptly notify* all persons named in such charge as prospective defendants . . . and *shall promptly seek* to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." *Id.* (emphasis added).

Congress's use of "shall" in the statute makes the EEOC's duties of notice and conciliation mandatory and impervious to judicial discretion. *See, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (citing *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)). Despite the fact that the express statutory requirements had not been met by the plaintiffs below, the Second Circuit's decision found that it could retain jurisdiction of the action under the ADEA. As such, the Second Circuit abused its discretion by allowing Kennedy to circumvent the ADEA's administrative remedies without evidence that the EEOC had initiated its statutory duties.

"Exhaustion of administrative remedies through the EEOC is an essential element of the Title VII [of the Civil Rights Act of 1964] and ADEA statutory schemes and, as such, a precondition to bringing such claims in federal court." *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001) (internal quotations omitted). The exhaustion of administrative remedies provides the EEOC with the opportunity to notify employers that a grievance has been filed and conciliate claims prior to an aggrieved party filing a lawsuit. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1973).[2]

The Second Circuit's approach deprived the EEOC of an opportunity to carry out either of its essential functions under the ADEA, and denied the employer the opportunity to investigate and resolve any issue prior to the commencement of litigation. First, the Second Circuit deprived the EEOC any meaningful opportunity to mediate employment grievances by allowing plaintiffs to proceed directly to litigation. This not only

[2] The ADEA's enforcement provisions mirror those of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), and reflect Congress's clear preference for administrative remedies over private lawsuits. *Rogers v. Exxon Research & Eng'g*, 550 F.2d 834, 841 (3d Cir. 1977).

undermines the EEOC's role as mediator and conciliator as intended by Congress, but it robs the parties of the chance to settle claims prior to initiating costly and time-consuming litigation.

The legislative history behind the ADEA is replete with references to the importance of the process of conciliation. For example, Senator Javits stated that the method of enforcement of the ADEA "is direct action in the District Court by the Secretary of Labor[3] or the employee for appropriate relief. Such action may only be commenced after informal methods of conciliation have been exhausted." 113 Cong. Rec. 7076 (daily ed. Mar. 16, 1967). The Senate Report stated:

> A condition precedent to the bringing of an action by an individual is that he must give the Secretary 60 days notice of his intention to do so. This is to allow time for the Secretary to mediate the grievance. It is intended that the responsibility for enforcement vested in the Secretary by Section 7 be initially directed through information methods of conciliation and that formal methods be applied only if voluntary compliance cannot be achieved.

S. Rep. No. 90-723, at 5 (1967). Consequently, the ADEA provides that an individual cannot initiate a civil action until

[3] Originally the Department of Labor maintained enforcement and regulatory authority over the ADEA. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7, 81 Stat. 602 (1967). As of July 1, 1979, however, these ADEA functions were transferred to the EEOC as part of President Carter's reorganization plan to consolidate the federal government's employment enforcement efforts. *See* Reorganization Plan No. 1 of 1978, *reprinted in* 1978 U.S.C.C.A.N. 9799. The Reorganization Plan was later was codified at 5 U.S.C. § 906.

sixty days after he has filed a "charge" with the EEOC alleging discriminatory conduct, thereby permitting voluntary conciliation.

When a claimant files a "charge," the EEOC is given the opportunity to investigate the charge, notify the employer, and work to resolve the claims through informal conciliation. Even if the EEOC is unable to resolve the charge without investigation, the EEOC's issuance of a probable cause determination educates the parties as to the strength of their respective positions. "A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case, as well as his own." *EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 601 (1981). Upon learning of a claim's strengths or weaknesses, the parties may decide that conciliation, rather than litigation, is the better course.

The EEOC's statistics demonstrate that, given the opportunity, many charges can be successfully settled and conciliated at the administrative level. The following table provides the number and percentage (of total charges resolved) of charges concluded at the administrative level in 2006 through settlement, conciliation or withdrawal. The table provides statistics for charges filed under the ADEA, and under all statutes enforced by EEOC.

	ADEA[4]	All Statutes[5]
Settlements (Negotiated)	1,417	8,500
	10.0%	11.4%
Successful Conciliation	177	1,141
	1.3%	1.5%
Withdrawal of charge upon receipt of desired benefits	767	4,052
	5.4%	5.5%
TOTAL	2,361	13,693
	16.7%	18.4%

By resolving a significant number of claims at the administrative level, the EEOC prevents costly and time-consuming litigation that burdens the parties and the courts.

Second, the Second Circuit held that Kennedy could proceed with suit without the EEOC ever notifying the employer of the dispute. Prompt notice of alleged

[4] *See* EEOC, *Charge Statistics – ADEA*, http://www.eeoc.gov/stats/adea.html.

[5] *See* EEOC, *Charge Statistics – All Statutes*, http://www.eeoc.gov/stats/all.html.

discriminatory acts is important because it gives employers the opportunity to detect and correct potentially discriminatory practices in a timely and efficient manner. It also provides the employer with an independent opportunity to settle the grievance without litigation.

Notice is particularly important, where, as here, the employer is faced with a class action discrimination lawsuit. The Second Circuit allowed eleven of the plaintiffs below to litigate their claims under the auspices of the "single filing rule." The single filing rule permits class members to forego the requirement of individually filing charges so long as one plaintiff has complied with Section 7(d) of the ADEA and the charge makes class allegations. "The rationale for th[e single filing] rule is to avoid needless repetition in the filing of administrative charges when the initial claim was sufficient to put the employer on notice of the alleged violations and afford the employer an opportunity for conciliation with the aggrieved employees." *Holowecki v. Fed. Express Corp.*, No. 02 Civ. 3355, 2002 WL 31260266, at *3 (S.D.N.Y. Oct. 9, 2002) (citing *Levy v. U.S. Gen. Accounting Office*, No. 97 Civ. 4016, 97 Civ. 4488, 1998 WL 193191, at * 2 (S.D.N.Y. Apr. 22, 1998)).

The Second Circuit allowed Kennedy and those piggybacking on her claim to proceed with suit even though *none* of the plaintiffs below filed a charge alleging class discrimination that complied with Section 7(d) of the ADEA prior to filing suit. Because no charge with class allegations was filed until after litigation was commenced, the EEOC did not notify the employer, Federal Express Corporation ("FedEx"), that one claim, let alone multiple claims, of discrimination was pending against it. Had FedEx received notice of the charge, it could have attempted conciliation

and settlement with the affected class of employees, and possibly avoided costly and cumbersome litigation.

If an employer is unable to conciliate or settle a discrimination claim, the ADEA's notice requirement serves to prevent an employer from having to defend against employment decisions that are long past. As recently noted by this Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, suits based on remote employment actions are disfavored because "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened." 127 S. Ct. 2162, 2171 (2007).[6] The *Ledbetter* case illustrated the problems created by tardy lawsuits where the plaintiff's claims turned principally on the misconduct of a single supervisor who allegedly retaliated against the plaintiff when she rejected his sexual advances during the 1980's. *Id.* at 2171 n.4. By the time of trial, this supervisor had died and, therefore, could not testify. This Court found that "a timely charge might have permitted his evidence to be weighed contemporaneously." *Id.*

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[6] Prior to *Ledbetter*, this Court showed a similar disdain for stale claims in *National Railroad Passenger Corp. v. Morgan*:

> Allowing suits based on such remote actions raises all of the problems that statutes of limitations and other similar time limitations are designed to address. Statutes of limitation promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

536 U.S. 101, 125 (2002) (internal quotations omitted).

In the context of ADEA actions, a standard that allows a claimant to file suit without notice to the employer places employers at risk of learning about the grievance well in excess of the congressionally prescribed statute of limitations. The ADEA provides that, to be timely, a charge shall be filed within 180 days after the alleged unlawful practice occurred, except in states with their own age discrimination laws and remedial agencies, where the time is extended to 300 days. 29 U.S.C. §§ 626(d), 633(b). Under the Second Circuit's logic, an intake questionnaire filed within the limitations period constitutes a timely "charge" that would preserve the claimant's right to subsequently file suit, even though the EEOC did not notify the employer as it would with a charge.

The consequence of the general application of such a rule would be for employers to receive notice of an employment grievance—as happened in this case—only when the claimant files suit against the employer. An ADEA claimant could wait years to bring a discrimination lawsuit in the absence of the EEOC acting on the claimant's filed questionnaire.[7] This failure to receive notice would significantly impede the employer's ability to adequately prepare for litigation in that it could not preserve "a record of" evidence contemporaneous with the alleged discrimination, document the testimony of key witnesses, or hire legal counsel to prepare its defense or to negotiate settlement.

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[7] Title VII, 42 U.S.C. 2000e-5(f)(1), and Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12117(a), each require the claimant receive a right to sue notice from the EEOC before bringing suit. Because receipt of a right to sue notice is not a condition precedent to bringing suit under the ADEA, the only limitation on a claimant's ability to file a lawsuit would be if the EEOC issued a notice of right to sue. A claimant would have to bring suit within ninety days if a notice of right to sue is received. 29 U.S.C. § 626(e).

The negative repercussions of employers failing to receive timely notice of allegations of discrimination go beyond effects on the employer. If an employer is unaware of a pending discrimination claim, it is unable to disclose that information to other businesses, which severely impacts the quality of due diligence. Shareholders and other businesses are placed in jeopardy of detrimentally relying upon audit reports or disclosures made by the business that, through no fault its own, inaccurately reflect its financial standing where unknown claims against it are not timely reported.

The EEOC's duties of conciliation and notice are an important part of its overall mission to eradicate employment discrimination. To hold otherwise would read out the mandatory requirements under the statute, and render the EEOC a meaningless weigh station or ticket taker—devoid of function or purpose on the road to the courthouse.

B. The Second Circuit's Decision Should Be Reversed Because It Misinterprets The EEOC's Regulations And Misunderstands EEOC Procedure

As the federal agency charged with investigating claims of employment discrimination under the ADEA and settling disputes arising thereunder, it is within the EEOC's province to establish procedures that allow it to efficiently process filed charges. The regulations governing the agency's procedures provide that only "[u]pon receipt of a *charge*" will the EEOC notify the prospective defendants and initiate conciliation efforts pursuant to the ADEA. 29 C.F.R. §§ 1626.11, 1626.12 (emphasis added).

The EEOC's regulations and the printed language on the intake questionnaire forms demonstrate that the EEOC does not intend a questionnaire to function as a "charge." *Id.*; *Diez v. Minn. Mining & Manuf. Co.*, 88 F.3d 672, 676 (8th Cir. 1996). The regulations make clear that, while a charge is "sufficient" if it names the respondent and generally alleges the discriminatory action, not all documents containing similar information are charges. *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 542 (7th Cir. 1988). The regulations distinguish between a "charge" and a "complaint," the latter defined as "information received from any source, that is not a charge, which alleges that a named prospective defendant has" violated one of the statutes administered by the Commission. 29 C.F.R. § 1626.3 (emphasis added); *see also Early v. Bakers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992).

Thus, the only plausible reason why the EEOC would distinguish a "charge" from other types of information communicated to the EEOC is that a "charge" is submitted under circumstances that would lead the EEOC to activate the ADEA's administrative review process. *Steffen*, 859 F.2d at 542. Moreover, there could be no other explanation as to why the EEOC labels certain forms as "Intake Questionnaires" and other forms as "Charges of Discrimination." *Diez*, 88 F.3d at 676.

By expanding the term "charge" to include intake questionnaires and other pre-charge documents, the Second Circuit's opinion eliminates the clear standard set forth by the EEOC's regulations as to when the agency's statutory obligations are invoked. If the EEOC does not understand a claimant's filing of an intake questionnaire to be a charge, it does not make any effort to notify the employer or conciliate the claim—duties that Congress has instructed the agency to undertake.

C. The Second Circuit's Decision Should Be Reversed Because It Is Not Supported By Existing Case Law

Courts have recognized two situations in which an intake questionnaire may function as a charge. The first approach, which the Seventh Circuit has dubbed "substantial compliance," finds that when a completed intake questionnaire satisfies the requirements for a charge and the circumstances demonstrate that the EEOC acted on the intake questionnaire, the questionnaire may serve as the claimant's filed charge. *Early*, 959 F.2d at 79. This approach finds that if the EEOC triggers its statutory obligations upon the receipt of an intake questionnaire, "it is hard to see what more to ask of the employee." *Id.* at 80; *see also Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1235 (11th Cir.) (finding, on facts almost identical to those of *Holowecki*, that plaintiffs' claims were time-barred because case lacked exceptional circumstances, such as the EEOC acting on the intake questionnaire, to find that the questionnaire could suffice as a charge), *cert. denied*, 543 U.S. 1020 (2004); *Clark v. Coats & Clark, Inc.*, 865 F.2d 166 (3d Cir. 1982) (finding intake questionnaire fulfilled all of the ADEA's statutory objectives desired by Congress where employers received notification); *cf. Price v. Sw. Bell Tel. Co.*, 687 F.2d 74, 78-79 (5th Cir. 1982) (precluding summary judgment in Title VII case where EEOC, upon receipt of complaint, initiated the administrative process).

Alternatively, courts have found that misleading conduct by the EEOC can be a basis for tolling the administrative statute of limitations. *Early*, 959 F.2d at 81. *Compare Steffen*, 859 F.2d at 543 (holding that where the EEOC informed claimant that it would be treating the intake questionnaire as

a charge, but did not do so, claimant's action would not be barred), *with Diez*, 88 F.3d at 677 (finding intake questionnaire could not function as a charge because no evidence that state agency misled claimant).

The Second Circuit relied on inapposite authority to conclude that the an intake questionnaire could suffice as a charge, absent circumstances that the EEOC acted on the questionnaire. In particular, the Second Circuit relied on *Hodge v. New York College of Podiatric Medicine*, 157 F.3d 164 (2d Cir. 1998) for the proposition that Kennedy could proceed with suit without first exhausting administrative remedies. The Second Circuit stated that "it is not required that the EEOC has actually taken action before an individual who otherwise satisfactorily filed a charge, can bring suit in federal court." *Holowecki v. Fed. Express Corp.*, 440 F.3d 558, 562 (2d Cir. 2006). However, *Hodge* is not a case that held that intake questionnaires can function as charges.

In *Hodge*, a professor alleged that the New York College of Podiatric Medicine (the "College"), his employer, violated the ADEA by refusing to extend his two-year teaching contract as required by a faculty manual. 157 F.3d at 165. Prior to his termination, the professor filed a charge of age discrimination with the EEOC. *Id.* at 166. The professor thereafter entered into a settlement agreement with the College whereby the College agreed to employ him for one final year. *Id.* In turn, the professor agreed to release the College from liability under the ADEA, and withdraw his EEOC charge. *Id.* Shortly after completing his final year of employment, the professor filed an ADEA lawsuit. *Id.*

The district court dismissed the suit on the basis that the professor's action was time-barred because the lawsuit was

brought more than ninety days after termination of the EEOC charge. *Id.* at 167. The Second Circuit reversed, finding that the release agreement signed by the professor withdrawing his EEOC charge was invalid under the Older Workers Benefit Protection Act. *Id.* The invalid release prevented dismissal of the professor's ADEA action because withdrawal of the claim under the release could not trigger the ninety-day period for bringing an ADEA action, the Second Circuit held, so as to preclude future suit once that period expired. *Id.* To find otherwise would cause the professor and others in his circumstances to lose their ADEA rights within ninety days of signing an invalid release agreement. *Id.*

The Second Circuit's holding in *Hodge*, that a period of limitation did not accrue where the employee's withdrawal of the EEOC complaint was based on an invalid settlement agreement, had no bearing on the issue before the Second Circuit in *Holowecki*. That issue—whether an intake questionnaire could function as a charge sufficient to exhaust ADEA's administrative remedies—is not addressed by *Hodge*. Given that the plaintiff in *Hodge* filed a timely charge of discrimination with the EEOC prior to initiating his lawsuit, the Second Circuit's reliance on *Hodge* was misplaced.

The Second Circuit had no basis for finding that the intake questionnaire filed in the instant case could function as a charge given the standards set forth by its sister circuits. In the proceeding below, there was no evidence that the EEOC began investigating the claim, offered to conciliate the claim, notified the employer, or misled Respondent Patricia Kennedy. Therefore, the Second Circuit's decision should be reversed where it was not supported by the relevant case law.

II. THE SECOND CIRCUIT'S FINDING THAT AN INTAKE QUESTIONNAIRE MAY ROUTINELY FUNCTION AS A CHARGE SHOULD BE REVERSED BECAUSE IT DEPRIVES EMPLOYERS OF THE BENEFIT OF THE EEOC'S VETTING PROCESS FOR DISCRIMINATION CLAIMS

The Second Circuit's finding that an intake questionnaire may serve as a charge, regardless of any other circumstances surrounding a claimant's failure to timely file a formal charge, is tantamount to a finding that every completed questionnaire functions as a charge. The practical implications of such a rule would be to subject employers to discrimination claims that have not been properly vetted by the EEOC. In addition, a finding that every intake questionnaire is the equivalent of a charge harms employers because it will increase the EEOC's workload to a point that the agency cannot efficiently process claims and, in turn, fulfill its statutory obligations.

A. Finding That An Intake Questionnaire Should Function As A Charge Forces Employers To Respond To Charges That Have Not Been Vetted By The EEOC

The Second Circuit's decision eviscerates the EEOC's current procedure for vetting claims of discrimination. Central to the EEOC's mission of eradicating employment discrimination is the development and implementation of charge-resolution programs and processes. *See* Dr. E. Patrick McDermott, *An Evaluation of the EEOC Mediation Program* (Sept. 20, 2000), *available at* http://www.eeoc.gov/mediate/report/index.html. To determine which claims deserve further investigation and employer notification, the EEOC has adopted a two-step filing procedure embodied in a pair of

forms: the Intake Questionnaire (Form 283) and the Charge of Discrimination (Form 5).

These two documents differ in both form and function. The Intake Questionnaire solicits preliminary information, while filing a Charge of Discrimination formally engages EEOC's administrative machinery. In a typical claimant's situation, on the first visit to an EEOC office, the individual completes an intake questionnaire that requests the claimant's name and address, the reason for the alleged discriminatory action, a brief description of the action complained of, and the name, address, and size of the employer. On the basis of this submission, an EEOC official determines whether grounds exist for filing a charge.

The Second Circuit's finding that an intake questionnaire can function as a charge strips the EEOC of the initial layer by which it vets discrimination claims. This approach would force employers to respond to frivolous claims of discrimination where all claims—whether submitted on an intake questionnaire or charge form—would invoke the statutory machinery and be forwarded to the employer for response.

B. Finding That Every Intake Questionnaire Is A Charge Harms Employers Where It Increases The EEOC's Workload Such That The Agency Cannot Efficiently Process Claims Or Fulfill Its Statutory Obligations

The EEOC currently employs a charge-prioritization system to further weed out frivolous discrimination claims. The system provides classification of charges into three

categories, simply named Category A, B, and C.[8] *See* EEOC: New Charge-Processing System Means More Action at Local Level, Official Says, 92 Daily Lab. Rep. (BNA) D-9 (May 12, 1995). This charge prioritizing process acts as a "triage" procedure that allows the EEOC to classify cases depending on merit and importance, and to close out many charges after brief investigations. Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing By Mandatory Mediation*, 105 Dick. L. Rev. 305, 310 (2001). Category A charges receive priority because these cases contain reasonable cause to believe that a violation occurred. Category B is investigated as agency resources permit, and the EEOC immediately dismisses charges in Category C.

A rule that intake questionnaires should be processed as charges would flood the EEOC with discrimination claims to be recorded, processed, and "triaged." Such a rule would overburden an agency that is already under considerable strain. A burgeoning workload, accompanied by a shortage of staff, has created a backlog in the processing of filed charges. Congress recently recognized the challenges facing the agency when it approved a $4 million increase over the EEOC's fiscal year 2007 budget. Chairman Allan B. Mollahan said in a committee report on the House appropriation bill that the increased funding for EEOC was needed to reduce the backlog of discrimination charges that

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[8] Category A charges receive priority because they are "more likely than not" to demonstrate discrimination has occurred; Category B charges are held until the EEOC receives further evidence as to whether it is more likely than not that a violation has occurred; and Category C charges are subject to immediate dismissal. *See* EEOC: New Charge-Processing System Means More Action at Local Level, Official Says, 92 Daily Lab. Rep. (BNA) D-9 (May 12, 1995).

the Commission estimates will grow to more than 67,000 in fiscal 2008. H.R. Rep. No. 110-240, at 131 (2007).

Adding to the EEOC's workload the responsibility of processing and investigating intake questionnaires can only cause the current backlog to increase. A backlog requires substantial resources just to maintain the *status quo* and subjects both claimants and employers to longer delays in handling cases. The inevitable result would be less effective enforcement of the ADEA.

III. THE SECOND CIRCUIT'S INTERPRETATION PERMITTING INTAKE QUESTIONNAIRES TO SUBSTITUTE FOR CHARGES IS INCORRECT BECAUSE IT WOULD PLACE THE EEOC IN THE POSITION OF HAVING CONFLICTING OBLIGATIONS UNDER THE PRIVACY ACT AND THE ADEA

The Privacy Act establishes strict controls over what personal information is collected by the federal government and how it is used. *See* 5 U.S.C. § 552a. Intake questionnaires and charges both qualify as records governed by the Privacy Act. *See* 29 C.F.R. § 1611.10 (stating that "the Commission shall not disclose any record which is contained in a system of records it maintains[.]"). But only the charge form is subject to an exception from the prohibition on disclosure under the Privacy Act where it provides on the form that the information within the charge form may be disclosed to the employer. *See* 5 U.S.C. 552a(b) (providing for disclosure based on consent of person giving information).

The EEOC is prohibited from disclosing the information contained within an intake questionnaire unless the claimant

consents to the disclosure in writing. For example, if a person submits an intake questionnaire to the EEOC, that record is covered by the Privacy Act. If the EEOC receives an intake questionnaire, and prior written consent has not been given for the EEOC to disclose the record to the employer, the EEOC is prohibited from disclosing the record. This is the case even if the EEOC treats the intake questionnaire as a charge, thus triggering its obligations to provide notice to the employer under the ADEA.

The Second Circuit's decision to allow intake questionnaires to substitute for charges places the EEOC in what amounts to a legal "Catch-22" because the agency cannot satisfy its statutory duty to provide notice to employers without violating the provisions of the Privacy Act.

CONCLUSION

For the foregoing reasons, the Court should reverse the Second Circuit's decision below.

Respectfully submitted,

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FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

PAUL HOLOWECKI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 06-1322

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

PAUL HOLOWECKI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council, the National Federation of Independent Business Legal Foundation (NFIB Legal Foundation), and the Society for Human Resource Management (SHRM) respectfully submit this brief as *amici curiae*.[1] Letters of consent from both parties have been filed

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

with the Clerk of the Court. The brief supports Petitioner Federal Express Corporation in favor of reversal.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business Legal Foundation (NFIB Legal Foundation), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files *amicus* briefs in cases that will impact small businesses nationwide.

The Society for Human Resource Management (SHRM) is the world's largest professional association devoted to human resource management. The Society's mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948,

SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States, as well as offices in China and India.

Amici's members are employers or representatives of employers that are subject to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, as well as other equal employment laws and regulations. As employers and representatives of employers that are subject to the ADEA, *amici* have a significant interest in the issue presented in this case – whether the mere act of submitting a pre-charge intake questionnaire to the Equal Employment Opportunity Commission satisfies the ADEA's charging filing requirement when the agency does not process the form as a charge or provide notice to the employer.

Amici seek to assist the Court by highlighting the impact its decision in this case will have beyond the immediate concerns of the parties to the case. Because of their experience in these matters, *amici* are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Patricia Kennedy worked as a courier for Federal Express Corporation (FedEx). Pet. App. 4a. In December of 2001, Kennedy filled out a pre-charge intake questionnaire and submitted it to the U.S. Equal Employment Opportunity Commission (EEOC) along with a four-page, signed affidavit, alleging that FedEx's new performance standards discriminated on the basis of age. Pet. App. 8a.

The EEOC took no action in response to Kennedy's intake questionnaire. Pet. App. 39a. It did not notify FedEx that a charge had been filed and did not assign a charge number. *Id.* Nor did the agency investigate Kennedy's allegations. *Id.*

Several weeks later, Kennedy filed an ADEA class action lawsuit along with a group of other FedEx employees – including Paul Holowecki, the lead plaintiff in the case. *Id.* at 18a, 38a. Only after initiating suit did Kennedy file a formal charge of discrimination with the EEOC. *Id.* at 33a.

Holowecki and the other plaintiffs argued that Kennedy's intake questionnaire constituted a valid charge upon which they could "piggyback" their claims.[2] *Id.* at 12a. A federal trial court dismissed the lawsuit, however, ruling that Kennedy's intake questionnaire was not "the equivalent of a charge" and that the plaintiffs' formal charge was untimely because it was filed one month after suit had been filed. *Id.* at 39a.

On plaintiffs' appeal, the Second Circuit reversed, concluding that Kennedy's intake questionnaire constituted a valid EEOC charge, even though the EEOC never treated it as one and Kennedy later returned to the agency to file a charge. *Id.* at 20a. While the ADEA requires an individual to file a timely charge with the EEOC before bringing suit, the Second Circuit ruled that the regulatory requirements are "minimal" and, therefore, any minimally sufficient intake questionnaire would suffice as a charge so long as it "manifest[s] an individual's intent to have the agency initiate its investigatory and conciliatory process." *Id.* at 14a-15a. Because Kennedy's questionnaire contained full contact information for the employer and provided information about alleged violations of the ADEA, the court concluded that it satisfied the statutory and regulatory requirements for the content of an ADEA charge, even though FedEx never received notice of the charge. *Id.* at 18a. Moreover, the "forceful tone" of the questionnaire and affidavit communicated Kennedy's "intent

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[2] None of the eleven piggybackers had ever filed a charge. Pet. App. 11a.

to activate the [EEOC's] administrative process," the court said. *Id.* at 19a.

FedEx petitioned this Court for a writ of certiorari, which was granted on June 4, 2007.

SUMMARY OF ARGUMENT

Congress expressly provided that individuals claiming a violation of the ADEA are required to exhaust administrative remedies by filing a charge of discrimination with the EEOC prior to initiating suit in federal court. 29 U.S.C. § 626(d). The important purpose behind this statutory requirement is to give prompt notice to the employer and provide the EEOC "with an opportunity 'to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance . . . .'" Pet. App. 15a.

The dispute in this case centers on whether an age discrimination plaintiff satisfies this charge filing requirement simply by completing an EEOC "intake questionnaire" – a form used by the agency to facilitate pre-charge interviews with prospective claimants. In most cases, as the case was here, the EEOC does not notify the employer when an intake questionnaire is received or otherwise treats the form as a charge. No investigation is conducted and conciliation is not attempted.

The Second Circuit's ruling below, that even an unprocessed, unserved intake questionnaire is a charge "filed" with the agency as long as its content purports to "communicate[ ] [the employee's] intent to activate the EEOC administrative process," runs directly counter to the ADEA's requirement that a plaintiff first exhaust his or her administrative remedies. Pet. App. 18a. Moreover, granting *de facto* charge status to intake questionnaires only serves to foster unnecessary confusion about when (or whether) an individual's claim has been properly "filed" with the agency. Indeed, some plaintiffs will

be permitted to litigate in federal court without any notice to the employer before the filing of a civil complaint, as the case was here, thus effectively eliminating the statute's exhaustion requirement and undermining employer efforts to resolve employment discrimination disputes without resort to litigation.

An employer's first notice of a claim should never come in the form of a lawsuit. Accordingly, *amici* urge the Court to make clear that the submission of an intake questionnaire is not tantamount to "filing" a charge, except in the rare instance when the questionnaire both satisfies EEOC regulations concerning the sufficiency of charges and is actually treated as a charge by the agency, with prompt notice provided to the employer.

ARGUMENT

I. THE MERE ACT OF SUBMITTING TO THE EEOC A PRE-CHARGE INTAKE QUESTIONNAIRE WILL NOT SATISFY THE ADEA'S CHARGE FILING REQUIREMENT WHEN THE AGENCY DOES NOT TREAT THE FORM AS A CHARGE

As one of the chief federal civil rights enforcement agencies, the EEOC's mission is to prevent and correct unlawful employment practices through investigation, voluntary settlement and conciliation and, in extraordinary instances, litigation in the public interest. Where an individual suspects unlawful age discrimination has occurred, he or she is required to first exhaust administrative remedies by filing a charge of discrimination with the EEOC. 29 U.S.C. § 626(d).

The dispute in this case centers on whether an age discrimination plaintiff can satisfy the ADEA's charge filing requirement simply by completing an EEOC "intake questionnaire" – a form used by the agency to facilitate interviews with potential charge filers. Many thousands of prospective

claimants complete intake questionnaires each year, although many ultimately decide not to file a charge. For this reason, the EEOC usually will not notify the employer or conduct an investigation when an intake questionnaire is received, as it does when a charge is filed.

A. Under EEOC Procedural Rules, "Intake Questionnaires" Usually Are Not Processed As Charges

While the manner in which the intake function is performed can vary from office to office, all offices generally follow certain basic procedures. When a potential charge filer first approaches the agency, he or she typically will be asked to fill out an "intake questionnaire" or a "Form 283." EEOC Compl. Man. § 1.7, Office Visitor Requests (June 2001). The intake questionnaire serves as a "preliminary device" designed to help an EEOC investigator, or other agency staff who perform charge intake functions, conduct an intake interview – the next step in the intake process. *Id.* During the interview, EEOC staff will determine whether the person's complaint falls within the agency's jurisdiction, and possibly prepare a charge on an EEOC "Form 5" charge form. EEOC Compl. Man. § 2.5, Drafting the Charge/ Complaint (Oct. 2002). Once an individual signs the charge form, the agency will assign a charge number and serve "prompt" notice to the employer (or notice within ten days if the charge alleges violations of Title VII or the ADA). EEOC Comp. Man. § 2.7, Docketing and Disposition of Charges/ Complaints (Aug. 2002); EEOC Comp. Man. § 3.1, Introduction (June 2001).

When an intake interview reveals that the agency has no jurisdiction over a complaint, however, EEOC intake staff will counsel the individual or make a referral. EEOC Comp. Man. § 1.7, Office Visitor Requests (June 2001); EEOC Comp. Man. § 2.4, Pre-Charge Counseling (Aug. 2002). An indi-

vidual also might choose not to pursue a claim over which the agency does have jurisdiction. EEOC Comp. Man. § 1.7, Office Visitor Requests (June 2001). In situations where the prospective charge filer ultimately decides not to pursue a claim, the agency will place the intake questionnaire in a "suspense file" where it remains until it is eventually discarded. *Id.*; EEOC Comp. Man. § 2.7, Docketing and Disposition of Charges/Complaints (Aug. 2002). No notice is given to the employer, and no investigation is conducted.

Accordingly, under the EEOC's procedural rules, intake questionnaires generally are not treated as charges, and the agency does not routinely investigate them.

B. The ADEA Requires "Prompt" Notice Of The Filing Of A Charge, An Agency Investigation, And Conciliation

Congress expressly provided that individuals claiming a violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, are required to exhaust administrative remedies by filing a charge of discrimination with the EEOC prior to initiating suit in federal court. 29 U.S.C. § 626(d). The important purpose behind this statutory requirement is to give notice of the claim to the employer and to provide the EEOC with an opportunity to eliminate the discriminatory practice or practices alleged and effect voluntary compliance. *Id.* ("Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal means of conciliation, conference and persuasion").

The legislative history of the ADEA confirms that Congress deliberately selected administrative resolution as the preferred means for resolving claims brought under the Act:

> A condition precedent to the bringing of an action by an individual is that he must give the Secretary 60 days

> notice of his intention to do so. This is to allow time for the Secretary to mediate the grievance. It is intended that the responsibility for enforcement vested in the Secretary by Section 7 be initially directed through informal methods of conciliation and that the formal methods be applied only if voluntary compliance cannot be achieved.

Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038 (5th Cir. 1977) (quoting 113 Cong. Rec. 31250 (Nov. 6, 1967)); *see also Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 841 (3d Cir. 1977) ("The thrust of the ADEA's enforcement provisions is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor").[3]

Congress made the same choice with respect to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Whenever a charge of discrimination is filed under Title VII, the EEOC statutorily is required to provide the employer-respondent with notice of the charge and to investigate the allegations. 42 U.S.C. § 2000e-5(b). The purpose of this administrative scheme is to allow the EEOC "to settle disputes through conference, conciliation, and persuasion before the aggrieved party is permitted to file a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), this Court considered the question of whether an ADEA plaintiff forfeits his ability to pursue an action in federal court where he fails first to submit his claim to a state agency for administrative resolution. Noting the similarities between Title VII and the ADEA's enforcement schemes, the Court stated a clear preference for administrative resolution of discrimination claims, particularly those arising under the ADEA, ob-

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[3] Administrative enforcement of the ADEA was transferred from the Secretary of Labor to the EEOC in 1972. Exec. Order No. 12,144, 44 Fed. Reg. 37,193 (June 26, 1979).

serving that Congress "intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state [administrative] proceedings." *Id.* at 756 (citations and internal quotations omitted).

Generally speaking, the EEOC's procedures for filing a charge are straightforward, and prospective claimants should be required to follow them. Under those procedures, "an intake questionnaire is not intended to function as a charge," because the purpose of a charge (unlike the intake questionnaire) is to: 1) notify the employer that a discrimination charge has been filed with the EEOC; and 2) initiate the EEOC investigation of the complaint. *Pijnenburg v. West Ga. Health Sys., Inc.*, 255 F.3d 1304, 1305-06 (11th Cir. 2001). Accordingly, "[t]o randomly treat [the] questionnaire as a charge would thwart these two objectives." *Id.* at 1306. As the Seventh Circuit has observed, to recognize intake questionnaires "willy-nilly as charges would be to dispense with the requirement of notification of the prospective defendant, since that is a requirement only of the charge and not of the questionnaire." *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992).

Arguably, an individual can accomplish a charge filing if the intake questionnaire both satisfies EEOC regulations concerning the sufficiency of charges and is actually *processed by the agency as a charge*. *See Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989) (plaintiff's intake questionnaire could serve as a charge of discrimination where the questionnaire contained the information needed to support a charge and the EEOC treated it as such by serving notice on the employer); *Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir. 1991) (EEOC intake questionnaire would suffice as a charge where the agency assigned it a charge number and promptly notified the employer that a charge had been filed); *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir. 1982) (the fact that the EEOC initiated

the enforcement process in response to its receipt of plaintiff's completed charge intake questionnaire is "relevant" to the question of whether a charge had been filed with the agency). In such cases, the intake questionnaire may constitute a charge "filed" with the agency if it contains the requisite information and fulfills the statutorily-required functions of providing notice to the employer and initiating an investigation and conciliation.

In the instant case, however, the EEOC did not process Kennedy's intake questionnaire as a charge and the company received no notice that a charge had been filed. Indeed, the company only became aware of Kennedy's claim after suit was filed in federal court. In order to give Kennedy's intake questionnaire *de facto* charge status, the Second Circuit below adopted a sweeping standard that would render virtually every unprocessed, unserved intake questionnaire a filed charge. Under this standard, any intake questionnaire submitted to the agency would be considered a charge "filed" with the agency if it purports to "communicate[] [the employee's] intent to activate the EEOC administrative process." Pet. App. 18a. In the Second Circuit's view, the fact that the EEOC never processed the form as a charge, provided notice to the employer, or conducted an investigation was immaterial. *Id.* at 16a. It concluded an individual can accomplish filing simply by submitting a questionnaire that contains "forceful tone and content," sufficient that he or she intends the form to be a charge. *Id.* at 19a.

C. Treating An Intake Questionnaire As A Filed Charge Without Notice To The Employer Undermines The ADEA's Goal Of Resolving Discrimination Claims Through Voluntary Means

This standard articulated by the Court below puts the EEOC in the position of having to guess a person's intentions, and if it guesses incorrectly, the employer's first notice

of a claim may not come until after a lawsuit has been filed, as the case was here. An employer's first notice of a discrimination claim should never come in the form of a private lawsuit. The EEOC is not merely a short stop to have one's ticket punched on the way to federal court. Rather, the EEOC's statutorily required efforts at "conciliation, conference and persuasion" form the cornerstone of enforcement of federal anti-discrimination laws. Where a plaintiff submits a completed intake questionnaire, but then files a lawsuit without first having taken care to ensure a proper administrative charge filing has been accomplished, the exhaustion requirement is not satisfied, which deprives the parties of the opportunity to resolve the dispute informally without resorting to protracted litigation.

An employer managing an EEOC charge investigation has a strong interest in resolving the dispute early, not only to conserve resources but also to preserve the relationship between the company and the charging party, particularly if the individual is a current employee. Meaningful efforts to conciliate a discrimination charge by the EEOC, which is an "outsider" to the dispute, helps to avoid unnecessary escalation of the matter. Early resolution with the EEOC's assistance also may help to repair an employer-employee relationship that now may be merely strained, but may be destroyed irretrievably by the acrimony and scorched earth tactics of litigation.

II. GRANTING *DE FACTO* CHARGE STATUS TO INTAKE QUESTIONNAIRES UNDER THE SECOND CIRCUIT'S STANDARD WILL INCREASE CHARGE FILINGS, GENERATE UNNECESSARY CONFUSION AND PREJUDICE EMPLOYERS WHO MUST DEFEND AGAINST STALE CLAIMS

Granting automatic charge status to intake questionnaires under the Second Circuit's standard would increase exponen-

tially – at tremendous additional cost to employers – the numbers of complaints that now must be investigated by the agency. Employers already expend an extraordinary amount of time and resources each year defending against discrimination charges and lawsuits, most of which lack merit and ultimately fail. The EEOC received more than 75,000 discrimination charges in 2006, for example, with the agency finding "reasonable cause" to believe discrimination occurred in only 5% of the cases investigated that year. Equal Employment Opportunity Comm'n, *Enforcement Statistics and Litigation, All Statutes FY 1992 – FY 2006* (Jan. 31, 2007)[4]. As the agency's own charge statistics suggest, discrimination very often is *not* the underlying cause of the problems related in intake questionnaires. It is only through charge counseling performed by skilled EEOC staff, *which the intake questionnaire is designed to facilitate*, that the true reasons behind any discord might become apparent.

Because the EEOC does not routinely process intake questionnaires as charges, whether or not a particular questionnaire is considered a charge "filed" with the agency should not hinge on what a person says on the form, but rather on what the agency does with it. If an intake questionnaire contains the requisite information and is processed as a charge, with prompt notice given to the employer, only then may it be considered a "charge."

While most federal appeals courts will not "willy-nilly" recognize intake questionnaires as charges, some have occasionally recognized unserved, unprocessed intake questionnaires as filed charges to avoid penalizing a plaintiff for the EEOC's failure to accomplish a timely filing when the agency promised to do so. In *Steffan v. Meridian Life Ins. Co.*, 859 F.2d 534, 544 (7th Cir. 1988), for example, the Seventh Circuit concluded that an unprocessed intake ques-

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[4] *Available at* http://www.eeoc.gov/stats/all.html.

tionnaire constituted a charge because an EEOC intake official mistakenly told plaintiff that filing the questionnaire would preserve the plaintiff's private suit rights. Likewise, in *Diez v. Minnesota Mining & Manufacturing Co.*, 88 F.3d 672, 677 (8th Cir. 1996), the Eighth Circuit ruled that an intake questionnaire might serve as a charge of discrimination if the plaintiff intended the questionnaire to be one and the agency led him to believe that it would be.

Kennedy does not claim that she was misled by the EEOC as to the status of her intake questionnaire. Furthermore, it is unnecessary for courts to waive the statutory exhaustion requirement in situations like these. Courts have long applied equitable principles to toll the limitations period when an untimely filing is directly attributable to misinformation provided by the EEOC. *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75 (7th Cir. 1992); *Schlueter v. Anheuser-Busch, Inc.*, 132 F.3d 455 (8th Cir. 1998). Applying the doctrine of equitable tolling in appropriate cases – rather than indiscriminately "deeming" an unprocessed, unserved intake questionnaire to be a charge – avoids unnecessary confusion over the status of an intake questionnaire and ensures that claimants, in most instances, are held to their administrative exhaustion obligation.

Moreover, the doctrine of equitable tolling (unlike the rule adopted by the Second Circuit below), places an affirmative duty on the plaintiff to accomplish a charge-filing "as early as he realistically could given that misinformation," thereby helping to ensure that even in the exceptional cases where tolling might apply, the employer still receives notice of the charge at the earliest possible opportunity. *Early*, 959 F.2d at 81 (citation omitted). Absent a clear requirement that claimants diligently pursue their discrimination claims by filing an administrative charge with the EEOC, employers will be placed in the untenable position of having to defend stale claims, which is precisely what Congress sought to avoid by

establishing a limitations period in the first place. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2170 (2007) ("The EEOC filing deadline 'protects employers from the burden of defending claims arising from employment decisions that are long past.'") (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980)). Indeed, the limitations period is "designed to assure fairness to defendants," and to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965) (citation and internal quotation omitted).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court reverse the decision below.

Respectfully submitted,

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